Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMIEL CHAGRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Double Jeopardy Clause bar a second trial and imposition of cumulative punishment for drug violations in 1975 after the Defendant has already been tried and convicted of conducting a continuing criminal enterprise from April of 1974 to April of 1978 in violation of 21 USC §848?

2. If "evidentiary overlap" in the two prosecutions is significant, was Defendant denied procedural due process where he made a *prima facie* showing of double jeopardy, the trial court reserved submission or consideration of the factual issues, and the court of appeals imposed the burden of proof on Defendant and refused a remand to develop the factual issues?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JAMIEL CHAGRA petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

OPINION BELOW

On June 30, 1981, the Court of Appeals entered its panel opinion reversing the determination of the United States District Court for the District of Massachusetts dismissing an indictment charging the Petitioner [hereafter Defendant] with conspiring to import, importing, conspiring to possess for distribution, and possession for distribution of a quantity

of marijuana in Massachusetts in 1975. The opinion is reported at 653 F2d 26 (1st Cir. 1981) and is reproduced as APPENDIX A hereof.

Defendant petitioned the Court of Appeals for rehearing and suggested the need for rehearing *en banc*. The petition for rehearing was denied by Order of August 21, 1981, which is reproduced as APPENDIX B hereof.

An initial decision by the District Court severing and continuing the two conspiracy counts on double jeopardy grounds is reported at 494 F.Supp. 908 (USDC D Mass. 1980) and reproduced as APPENDIX C hereof.

On reconsideration after intervening proceedings, the District Judge dismissed the indictment in its entirety on double jeopardy grounds. See Transcript of trial proceedings reproduced as APPENDIX D hereof.

CUSTODY OF DEFENDANT

Defendant is incarcerated at the Federal Correctional Institution in Marion, Illinois, under his conviction in the Western District of Texas for aiding and abetting another in the possession of cocaine and for conducting a continuing criminal enterprise. An appeal from that conviction is pending before the Court of Appeals for the Fifth Circuit.

JURISDICTION

Jurisdiction was initiated in this case by the indictment of a federal grand jury for the District of Massachusetts. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The *Fifth Amendment* of the United States Constitution provides, as pertinent:

". . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of . . . liberty . . . without due process of law. . ."

Title 18 USC §2 (as pertinent) provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal . . ."

Title 21 USC §841 (as pertinent) provides:

"a) . . . [I]t shall be unlawful for any person knowingly or intentionally—

(a) to . . . distribute . . . or possess with intent to . . . distribute . . . a controlled substance; . . .

(b) . . . [A]ny person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I . . . which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special

parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I . . . which is not a narcotic drug . . . such person shall . . . be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.
* * * "

Title 21 USC §846 (as pertinent) provides:

"Any person who . . . conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the . . . conspiracy."

Title 21 USC §848 provides:

"(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in

paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a)

of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper."

Title 21 USC §952 (as pertinent) provides:

"(a) It shall be unlawful . . . to import into the United States from any place outside thereof, any controlled substance in schedule I . . . of subchapter I of this chapter . . ."

Title 21 USC §960 (as pertinent) provides:

"(a) Any person who—

(1) contrary to section 952 . . . of this title, knowingly or intentionally imports . . . a controlled substance, . . .

shall be punished as provided in subsection (b) of this section.

(b)(1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I . . . the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I . . . the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I . . ."

Title 21 USC §963 (as pertinent) provides:

"Any person who . . . conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the . . . conspiracy."

Title 21 CFR §1308.11 (revised as of April 1, 1981) lists marijuana as a Schedule I substance described as "hallucinogenic."

STATEMENT OF THE CASE

A. The Texas Prosecution

In 1979, Defendant was federally indicted in the Western District of Texas. A copy of the Indictment is reproduced as APPENDIX E hereto. Two counts alleged conspiracies to import marijuana and cocaine. The third count charged aiding and abetting possession of cocaine by another. The fourth count accused the Defendant of conducting a continuing criminal enterprise as follows:

COUNT FOUR

[21 USC §848]

That *beginning on or about April 1, 1974, and continuously thereafter up to and including April 1, 1978,* in the *Western District of Texas,* the States of *Forida,* New Mexico, Colorado, Oklahoma, Connecticut, Pennsylvania, the Republic of Mexico, the *Republic of Colombia, and divers other places to the grand jurors unknown,* Defendant . . . [omitting proper name] . . . unlawfully, knowingly, and intentionally

> violated Sections 841, 846, 952, 963, Title 21, United States Code, as alleged in Counts One, Two and Three of this indictment (said counts being incorporated herein by reference), and as follows . . . [omitting eleven allegations of specific drug violations, the first three of which were later ordered removed from consideration of the jury] . . . *which violations were part of a continuing series of violations* of the Controlled Substances Act . . . and the Controlled Substances Import and Export Act . . . undertaken by Defendant . . . in concert with at least five other persons with respect to whom Defendant . . . occupied a position of organizer, a supervisory position, and any other position of management, and from which such continuing series of violations Defendant . . . obtained substantial income and resources . . . [omitting a general allegation for forfeiture] . . . all in violation of Title 21, United States Code, Section 848. (Emphasis added.)

While not specifying any Massachusetts violations, the Texas Indictment—

(1) did encompass the entire period of time charged in the later Massachusetts Indictment—January 1, 1975, to December 31, 1975; (2) did charge the conduct of the continuing criminal enterprise in the Western District of Texas (encompassing El Paso), Florida, and the Republic of Colombia—locales figuring prominently in the Massachusetts Indictment and the facts stipulated in Massachusetts; and (3) did charge the continuing criminal enterprise was conducted at "divers other places to the grand jurors unknown."

Defendant was convicted of counts Three and Four of the Texas Indictment and sentenced to fifteen years' imprisonment on Count Three with a special parole term for life and fined $25,000, and thirty years' imprisonment on Count Four and fined $100,000, with the sentence on Count Four to run concurrently with the sentence on Count Three.

In the course of the Texas trial, one HENRY WALLACE, the Government's key witness, testified about the subject of the Massachusetts indictment. His testimony is set forth below.[1]

---

[1]Q [Government counsel] Do you know a man named Jamiel Alexander Chagra?
A Yes, sir.
Q When did you first meet this individual?
A Summer of 1977.
Q And where did you meet him?
A Outside of El Paso, Texas.

. . .

Q Did you have a discussion with Mr. Chagra about what you were to receive as your part of this 6 kilo cocaine deal?
A Yes, sir.
Q What was that?
A The agreement that was reached was that the profits on the 6 kilos of cocaine would be split evenly in thirds, one-third for myself, one-third for Jimmy Chagra and one-third for Jim French.
Q Was there any discussion with Mr. Chagra as to how much this cocaine would cost?
A Yes, sir. He mentioned a price of $10,000.00 a kilo.
Q Did he tell you who was going to supply this cocaine?
A Yes, sir, he mentioned a name, Lionel Gomez, or the Lion.
Q Did he have a discussion with you at this meeting concerning any past involvement he had with Lionel?
A Yes, sir. He tole me that Lionel had supplied marijuana that had been burned in the crash of a DC-6, and also 57,000 pounds had gone to Boston on a boat and he had successfully unloaded and sold it.
Q Did you agree to assist Mr. Chagra in this venture to import 6 kilos of cocaine?
A Yes, sir, I did.

. . .

Q Mr. Wallace, on your arrival in Colombia, what conversation did you have with Mr. Lionel Gomez Cardenas about the cocaine transaction?
A When I arrived in Colombia and met with Mr. Lionel Gomez, I discussed—first of all, I identified myself as being a representative of Jimmy Chagra's.
Q Why did you do this?
A Because he was familiar with Jimmy Chagra and didn't—
. . . [intervening objection sustained] *(continued)*

Defendant's appeal from his Texas conviction is pending before the Court of Appeals for the Fifth Circuit.

B. The Massachusetts Prosecution

On May 7, 1980 (one month after Defendant was sentenced in Texas), Defendant was federally indicted in Massachusetts on four drug counts: I, conspiring from January 1, 1975, to December 31, 1975, at Gloucester, Massachusetts, and elsewhere, including El Paso, Texas, and Colombia, South America, to import marijuana; II, importing marijuana at Gloucester, Massachusetts in July, 1975; III, conspiring from January 1, 1975, to December 31, 1975, at Gloucester, Massachusetts, El Paso. Texas, and elsewhere to distribute marijuana; and IV, possessing marijuana at Gloucester, Massachusetts in July, 1975, with intent to distribute. A copy of the Massachusetts Indictment is reproduced as APPENDIX F hereof.

Defendant moved to dismiss the Indictment on double jeopardy grounds. At the hearing on the motion, the Government had present in court the very lengthy transcript of the Texas proceedings (exceeding 3000 pages). Government than acquiesced in the authority that after a defendant has made a non-frivolous, *prima facie* case of double jeopardy, the Government has the burden to prove otherwise by a

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(footnote continued from preceding page)

Q What did Mr. Lionel Gomez tell you about Mr. Chagra when you arrived in Colombia?

A Mr. Gomez told me and confirmed what Mr. Chagra had told me before about their first dealings being a Boston deal which they had, which was a boat that was sent to Boston and was unloaded by Chagra, and Mr. Gomez was repaid in full for it. And then later on, about their recent dealings which was a DC-6 which he had supplied the marijuana for.

preponderance of the evidence. The lower court reserved any issues involving the "same evidence" test, in contemplation that the double jeopardy issue might be decided, as a matter of law, by comparing the two indictments. When the District Court made its initial order severing and continuing the conspiracy counts (pending the outcome of Defendant's appeal on the Texas conviction), and ruled adversely to Defendant as to the two substantive counts, Defendant moved for reconsideration and offered the excerpt of WALLACE'S testimony above described. Government never did tender nor prove any portion of the Texas proceedings.

The District Court correctly construed 21 USC §848 in light of *Jeffers v. United States,* 432 US 137, 97 SCt 2207, 53 LEd2d 1689 (1977), holding that a §848 conviction bars a later prosecution of lesser or component offenses, including both conspiracies and substantive violations. (494 F.Supp. 908, 909) The District Court also correctly comprehended the nature of the crime defined by §848:

> "Even though the Massachusetts crimes were not specified, the Texas indictment referred to 'divers other places to the grand jurors unknown.' Evidence of the Massachusetts violations was admissible to establish the continuing series of violations alleged in the indictment. *United States v. Bergdoll,* 412 F.Supp 1308, 1318 (D.Del.1976). Although the indictment refers to a continuing series of violations, the statute actually prohibits engaging 'in a continuing criminal enterprise.' Continuity is a material element of the crime charged. The charge, and presumably the evidence, concerned violations in 1974 and 1976, 1977 and 1978. The jury's verdict of guilt of the continuing offense necessarily imports a finding that the defendant was engaging in a criminal enterprise during 1975. Evidence of the acts charged in the present case was not necessary to support that finding, but would have been admissible cumulative evidence." (494 F.Supp. 908, 909) The District

The District Court also correctly held that the bar of double jeopardy, with respect to a continuing offense, does not depend on the "same evidence" test, because the §848 defendant has been exposed to maximum jeopardy regardless of the election or failure of the Government to introduce evidence of the Massachusetts cases in the Texas trial.

The District Court was initially disturbed by the circumstance that the Texas court had no venue jurisdiction over the substantive Massachusetts counts. The District Court did, however, opine that if evidence of a crime committed wholly in Massachusetts were actually introduced in a §848 prosecution elsewhere, a later prosecution for the Massachusetts counts might be barred. (494 F.Supp. 908, 911 n.3) Without taking evidence on whether the Massachusetts violations had been introduced at the Texas trial, the District Court proceeded to hold the Defendant for trial under the two substantive Massachusetts Counts (II and IV). The District Court determined that the conspiracy counts (I and III) were barred by double jeopardy, except in the event Defendant's §848 conviction were reversed for prosecutorial misconduct in the return of the indictment, whereby dismissal of the indictment would arguably not support a claim of former jeopardy. The District Court, therefore, severed and continued Counts I and III pending the outcome of Defendant's appeal from his §848 conviction.

Defendant moved for reconsideration in the District Court, supporting his motion, in part, by excerpts from the Court Reporter's transcript of WALLACE'S testimony at the Texas trial about the involvement of the Defendant and LIONEL GOMEZ in the Massachusetts smuggling venture. When the Massachusetts case came on for trial, the District Court reconsidered the double jeopardy issues.

An appeal by one or the other of the parties to the Court of Appeals being imminent, the parties agreed to expedite the case by a bench trial on stipulated facts.[2]

. . .

Defendant was adjudged guilty of Counts II and IV and sentenced (upon the District Court's adoption of the recommedation of the Government) to 5 years' imprisonment on Count II to be served concurrently with Defendant's Texas sentence, and 2 years' imprisonment on Count IV, to be served consecutively to Count II and the Texas sentence. The District Court said of the WALLACE testimony:

> ". . . I have read the brief on reconsideration on which two points were raised: The first was that there was indeed evidence of the Massachusetts smuggling introduced into the Texas trial. This was supported by a page or so of transcript, and what I concluded to be a very passing reference, and I stand by the original ruling that I made that evidence of this case was not really introduced into that Texas trial.[3]
>
> "I am persuaded, however, that the issue of jurisdiction is not signifcant enough to justify a logical distinction between the substantive crime and the conspiracy charge with respect to the application of the bar of double jeopardy."

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[2]The stipulation is reproduced as **Appendix G** hereof.

[3]The District Judge had *not* made any "original ruling" but had reserved factual issues at the initial argument on the motion to dismiss. The District Judge never examined the transcript of the Texas trial. The Government did not make any showing at all of the issues and evidence at the Texas trial.

The WALLACE testimony manifestly *was* introduced into the Texas trial. Moreover, the Massachusetts prosecutor never disputed that LIONEL GOMEZ was the source of the marijuana which went to Massachusetts. Had Defendant been allowed to do so on a remand by the Court of Appeals, Defendant could have established, conclusively, that LIONEL GOMEZ was the key, pivotal figure in the Texas prosecution, either as the supplier, or connection to other suppliers, of the specific controlled substances which were the subject of most of the violations charged in the § 848 prosecution.

The District Court thereupon vacated its order severing and continuing the conspiracy counts, vacated Defendant's adjudication of guilt on the substantive counts, and dismissed the indictment in its entirety because of the bar of double jeopardy in view of Defendant's §848 conviction. (Appendix C)

On appeal by the Government, the Court of Appeals reinstated the entire indictment, resorting to the "venue" considerations ultimately renounced by the District Court, and to a "finding" (not supported by the record) that the Massachusetts violations were not "used" in the Texas trial. The Court of Appeals sought to bolster its "finding" by two footnote assertions. First, the Court of Appeals charcterized the WALLACE testimony as a "passing, hearsay reference" to the Massachusetts activity. (653 F2d 26, 31 n.5).[4] Second, the Court of Appeals "noted" that the parties had an opportunity to present to the District Court instances of "overlap" and on the basis of what was presented, the Court

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[4]Whether or not the WALLACE testimony was "passing" depended on the factual assessment of the jury in Texas. Since no court reviewed the Texas transcripts with reference to the Massachusetts case, there was no comparative basis on which to assess the significance of the WALLACE testimony to the Texas trial. If Defendant's application to the Court of Appeals for a remand to further develop factual issues had been allowed, Defendant (as noted in footnote 3 hereof) would have shown that LIONEL GOMEZ was the central source or connection to supply for the controlled substances involved in the §848 prosecution in Texas, as well as the source in the Massachusetts case.

Rule 801(d)(2), *Federal Rules of Evidence*, specifies in subdivision (A) that a party's own statement offered as an admission is not hearsay, and specifies in subdivision (E) that a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy is not hearsay. None of the WALLACE testimony was hearsay.

of Appeals did not "believe" that Defendant made a *prima facie* case of possible double jeopardy. (653 F2d 26, 34 n.8)[5]

Having thus erroneously discarded the procedural issues, the Court of Appeals than entered upon a lengthy, argumentative discussion of "lesser-included offenses," the "same evidence" test, "free-standing conspiracies," "Congressional power and intent" and "balancing the equities" to reach a result contrary to the Double Jeopardy Clause and the rule and rationale of *Jeffers v United States*, 432 US 137, 97 SCt 2207, 53 LEd2d 168 (1977).

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[5]Before the District Court, the Defendant relied on the acquiescense of the Government in the rule that when a *prima facie* case of double jeopardy was shown by a defendant, the Government was required to prove, by a preponderance of the evidence that double jeopardy did not in fact exist by reference to evidence of the former proceeding. *United States v. Stricklin*, 591 F2d 1112, 1118 (5th Cir. 1979). Defendant also relied on the representation of the District Court that it was "reserving" factual issues. When Defendant saw that the District Court made an initial ruling of a factual character about the Texas testimony, Defendant did immediately present the WALLACE testimony. When Defendant saw that the Government in its appeal brief was relying on factual issues, Defendant applied to the Court of Appeals, by his brief, for a remand if the matter were decided on other than strictly legal issues.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS IS CONTRARY TO THE DOUBLE JEOPARDY CLAUSE AND A CONTROLLING OPINION OF THE UNITED STATES SUPREME COURT.

The core issue of this case is whether a defendant who has already been tried and convicted in one federal jurisdiction of conducting a continuing criminal enterprise from 1974 continuously through 1978 can be subjected to a later prosecution in another federal jurisdiction of lesser conspiracy and substantive drug violations committed in 1975, within the period during which the continuing criminal enterprise was conducted.

The District Court properly vacated the Defendant's conviction and sentences on two substantive drug offenses, and dismissed the indictment which also charged two conspiracy offenses, as being barred by the Double Jeopardy Clause and in accordance with the rule and rationale of *Jeffers v. United States,* 432 US 137, 97 SCt 2207, 53 LEd2d 168 (1977).

The Court of Appeals reversed and reinstated the indictment in violation of the Double Jeopardy Clause and contrary to the rule and rationale of *Jeffers* in several particulars, as hereafter set forth.

The position of the Defendant is that 21 USC §848 prohibits a continuing course of conduct; that the scope of §848 is national[6] and even global;[7] that an election by the Government to prosecute under §848 forecloses the possibility of a later prosecution for any subordinate violation committed by the defendant within the time-frame of the continuing course of conduct; that such later trial and the imposition of cumulative punishment are prohibited by the Double Jeopardy Clause, whether or not the subordinate violations are used or relied on in the §848 prosecution; and that pryamiding of penalties is not permissible under 21 USC §848 and other provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

The Court of Appeals opinion is directly contrary to *Jeffers v United States, supra,* in numerous particulars, including the following:

(1) Under the tactic of discussing venue, lesser included offenses, the same evidence test, free-standing conspiracies, legislative power to prescribe allowable units of prosecution, and the balance of equities, the Court of Appeals held that Congress intended to allow multiple trials and pyramid punishment;

(2) Under these same tactics, the Court of Appeals re-extended the rule of *Iannelli v United States,* 420 US 770, 43 LEd2d 616, 95 SCt 1284 (1975) to §848 and lesser offenses in the Comprehensive Drug Abuse Prevention and Control Act of 1970;

[6]*United States v. Mannino,* 635 F2d 110 (2d Cir. 1980) holding it is not essential in a § 848 case for the Government to prove that the concert of "at least five other persons" existed at the same moment in time, or that the same superior subordinate relationship must have existed with each of the other persons involved.

[7]*United States v. Grammatikos,* 633 F2d 1013 (2d Cir. 1980), holding § 848 covers "global drug operations" as to which venue is properly laid at the nerve center of the operation of the accused.

(3) The Court of Appeals ignored the nature of the crime defined by §848 as defining and prohibiting a course of conduct;

(4) The Court of Appeals viewed the presence or absence of "use" of the subordinate offenses in proving up a §848 violation as determinative.

Jeffers involved the return of two indictments by a grand jury—one charging the defendant and others with a conspiracy under 21 U.S.C. §846, and the other charging the defendant alone with the conduct of a continuing criminal enterprise under 21 U.S.C. §848. Government sought to join the two indictments for trial. Defendant prevailed in his opposition to joinder and was first separately tried and convicted of the §848 continuing criminal enterprise offense. This Honorable Court held that the defendant had waived his right not to undergo two trials (when he might have but did not accept a single trial in which he would have been entitled to a lesser-included offense instruction to the jury), but defendant was not subject to cumulative punishment for the two convictions.

In rejecting Jeffers' double jeopardy argument, the Court of Appeals decision [*United States v. Jeffers,* 532 F.2d 1101, 1108-1111 (5th Cir., 1976] applied the rule of *Iannelli v. United States, supra,* wherein this Court had held that the general conspiracy statute (18 USC §371) and the prohibition against an illegal gambling business "involving" five or more persons (18 USC §1944) had different elements and were separately to be prosecuted and punished. On *certiorari,* this Court held that the *Iannelli* result could *not* be transferred to offenses under 21 USC §§846 and 848 (432 US 137, 146-150, 53 LEd2d 168, 177-180). This Court, however, carefully refrained from deciding Jeffers on the basis of a necessarily included, lesser offense determination.

On the issue of cumulative punishment, this Court held: (1) That 21 USC §848 reflected a comprehensive, severe, mandatory, and escalating penalty structure, and pointed out that since every §848 violation would, by definition, involve a series of other felony violations of the Act, there would have been no point in specifying maximum fines for the §848 violation if cumulative punishment was to be permitted;[8] (2) that the legislative history of §848 was inconclusive on the question of cumulative punishment; and (3) in view of the arbuably conflicting conclusions which could be drawn from the legislative history, there was no reason to deviate from the proscription against multiple cumulative punishment suggested by the comprehensive internal penalty structure of the statute (§848) itself.[9]

Many years have elapsed since *Jeffers* was decided. If the Congress had so desired, it could readily have made a legislative provision which would have specified circumstances under which cumulative or pyramid punishment

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[8] "Section 848 itself reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of penalties from other sections of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Even for a first offender, a fine of $100,000, and a forfeiture of all profits obtained in the enterprise and of any interest in, claim against, or property or contractual rights of any kind affording a source of influence over, the enterprise. §§ 828(a)(1), (2). The statute forbids suspension of the imposition or execution of any sentence imposed, the granting of probation, and eligibility for parole. § 846(c). In addition, § 848 is the only section in the statutes controlling drug abuse that provides for a mandatory minimum sentence. For a first offender, that minimum is 10 years. § 848 (a)(1). A second or subsequent offender must receive a minimum sentence of 20 years, and he is subject to a fine of up to $200,000, as well as the forfeiture described above and the maximum of lifetime imprisonment. Ibid. Since every § 848 violation by definition also will involve a series of other felony violations of the Act, see §§ 848(b)(1), (2), there would have been no point in specifying maximum fines for the § 848 violation if cumulative punishment was to be permitted." (432 US at 156, 53 LEd.2d at 183)

[9] "26. The Congress was plainly interested in punishing the professional criminal severely when it passed § 848. See, e.g., S Rep No. 91-613, pp

(continued)

could be imposed for §848 criminal liability, and subordinate or component drug violations. That the Congress has not so acted serves to reaffirm the *Jeffers* determination.

Jeffers took note of the character of §848 as penalizing a continuous course of conduct. Significantly, the court cited the case of *In re Nielsen,* 131 US 176, 33 LEd 118, 9 SCt 672 (1889) for the proposition that a person convicted of the greater offense may not be subjected to a second prosecution on the lesser offense, since that would be the equivalent of two trials for the same offense. *Nielsen* dealt with a statute prohibiting cohabitation by a man with more than one woman. *Nielsen* held that conviction of this continuing offense barred a further prosecution for adultery with a woman named in the cohabitation indictment, even though the time of commission of adultery was laid after the end of the alleged period of unlawful cohabitation. Even though the elements of adultery differed from the elements of unlawful cohabitation, the prosecution for adultery was barred because a person who has been tried and convicted for a crime which has various incidents included in it, cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense. *Neilsen,* in turn, relied on *In re Snow,* 120 US 274, 7 SCt 556, 30 LEd 658 (1887), which held that only one indictment and conviction for unlawful cohabitation was permitted, because the crime was a continuous one, constituting a single crime until prosecuted, and not permitting separate trial and punishment for the same crime during any part of the period of time

(footnote continued from preceding page)

2, 7 (1969); 116 Cong Rec 995, 1181, 1664 (1970) (remarks in House debate). Taken alone, this might support an argument for cumulative penalties. The House Report, however, indicates that the penalty scheme of the continuing-criminal-enterprise section was to be separate from the rest of the penalties. HR Rep. No. 91-1444, pt. 1, pp 10-11 (1970). In light of these arguably conflicting conclusions from the legislative history, we see no reason to deviate from the result suggested by the structure of the statute itself." (432 US 137, 156 53 LEd2d 168, 184).

charged in the indictment. *Snow* held that a continuing offense can be committed only *once,* for purposes of indictment or prosecution, prior to the time the prosecution is instituted.[10]

The Court of Appeals decision ignores the doctrine of lenity. This doctrine has nothing to do with being "soft on crime," but expresses the judicial restraint which must be employed so as not to extend the reach of a criminal statute beyond the limits fixed by the legislature. *TVA v. Hill,* 437 US 153, 57 LEd2d 117, 98 SCt 2279 (1978); *Busic v United States,* 446 US 398, 64 LEd2d 381, 100 SCt 1747 (1980).

Bifulco v United States, 447 US 381, 65 LEd2d 205, 100 SCt 2247 (198), held that the motive of Congress to be harsh on drug offenders under the Comprehensive Drug Abuse Prevention and Control Act of 1970, could not serve as the basis for the imposition of a special parole term under a section of the Act which did not authorize such a sentence.

Where the Double Jeopardy Clause is applicable, its sweep is absolute and there are no "equities to be balanced." *Burks v. United States,* 437 US 1, 57 LEd2d 1, 98 SCt 2141 (1978). The Double Jeopardy Clause protects interests wholly unrelated to the propriety of any subsequent conviction. *Abney v. United States,* 431 US 651, 97 SCt 2034, 52 LEd2d 651 (1977).

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[10]To the same effect is *United States v. Jones,* 533 F2d 1387 (6th Cir. 1976), *cert. den.,* 431 US 964, 97 SCt. 2919, 53 LED.2d 1059, holding that possession of a revolver involves a continuing course of conduct. Possession of the same revolver on three different occasions did not support a three-count indictment and cumulative punishment for what was only one offense.

II.

THE COURT OF APPEALS, CONTRARY TO PREVAILING AUTHORITY, IMPOSED A BURDEN OF PROOF ON DEFENDANT AND THEN DENIED A REMAND TO ALLOW SUCH PROOF IN VIOLATION OF DEFENDANT'S PROCEDURAL DUE PROCESS RIGHTS.

The Defendant made a *prima facie* showing of Double Jeopardy by moving to dismiss the indictment on such ground and appending thereto the record of the Defendant's prior prosecution and conviction of conducting a continuing criminal enterprise in violation of 21 U.S.C. §848. Defendant's motion was supported by a memorandum of authorities citing *United States v. Stricklin,* 591 F.2d 1112 (5th Cir., 1979) for the proposition that once a defendant has made a prima facie showing of double jeopardy, the burden is on the the Government to prove, by a preponderance of the evidence, that double jeaprdy does not exist. Government did not make a written response to the motion to dismiss but at the initial hearing on the motion, the prosecutor agreed that if the lower court found the Defendant had made a *prima facie* showing, then the Government would have the burden to prove that that two cases were not the same, and specifically joined Defendant in reliance on *United States v. Stricklin* for that proposition.

After the filing of Defendant's Motion for Reconsideration in the trial court, Government filed an opposing memorandum, in which it abandoned reliance on the "same

evidence" test, and asserted that the issue was not whether the [Massachusetts] testimony did or did not come into the Texas trial, but whether the Massachusetts testimony was required proof of an essential element of the §848 case in Texas.

Government never offered the transcript of the Texas trial, or any part thereof, and never sought to reopen the "same evidence" factual issue which the lower court "reserved" at the earlier hearing.

The lower court did not make any factual findings.

When the Government changed its theory of the case on appeal (contrary to *Steagald v. United States,* U.S. 1981, 68 LEd2d 38, 101 SCt 1642, Defendant applied to the Court of Appeals for a remand to offer further evidence linking LIONEL GOMEZ (the source for the Massachusetts marijuana) with the Texas prosecution as the key, pivotal person in most, if not all, of the Defendant's drug violations as the source or connection to the source of controlled substances in the Republic of Colombia. The Court of Appeals, being well-cognizant that the factual issue had not been developed in the lower court, and that the lower court had made no findings of fact, nevertheless asserted that both parties had had an opportunity to offer such proof in the lower court (contrary to the record), and added, apparently as an afterthought, that the Defendant had not made a *prima facie* showing of double jeopardy, citing *Strickland v. United States, supra.* (653 F.2d at n.8, p. 34).

The Court of Appeals of every Circuit which has passed on the issue has held that after the defendant makes a *prima facie* claim of double jeopardy, the Government has the burden of proving that two separate crimes are charged by the two proceedings. *United States v. Inmon,* 568 F.2d 326, 329 (3rd Cir., 1977); *United States v. Jabara,* 644 F.2d 574 (6th Cir., 1981); *Stricklin v. United States, supra.*

This ruling is the only ruling which is compatible with *Abney v. United States,* 431 U.S. 561, 97 SCt 2034, 52 LEd2d 651 (1977), affirming that the Double Jeopardy Clause is intended to assure an individual that he will not be forced to endure the strain, public embarrassment, and expense of a criminal trial more than once for the same offense— interests which are wholly unrelated to the propriety of any subsequent conviction. Orderly procedure is imperative. The Defendant relied upon the procedure herein set forth, and then, when the Government improperly changed its theory of the case, the Court of Appeals approved the improper procedure and even blessed it by relying on such changed theory, asserting "findings" had been made in the trial court (when they were not) and making "findings" contrary to the record and the law as to the nature and significance of the WALLACE testimony.

This conduct deprived Defendant of the opportunity, on fair notice, to disprove the "freestanding conspiracy" doctrine employed by the Court of Appeals, and violated the Defendant's procedural due process rights. The determination of the Court of Appeals is contrary to the rule followed in all other Circuits passing on the issue and the conflict requires resolution on *certiorari.*

Finally, the Court of Appeals placed heavy significance on its purported "finding" that evidence of the Massachusetts violations were not "used" in the Texas § 848 trial. Defendant contends that the bar of double jeopardy and the prohibition against cumulative punishment applies, whether or not evidence of the Massachusetts violations was "used" in the Texas trial. Support for this contention is found in *Jeffers v. United States, supra,* where, although the two indictments there were similar in detail and covered the same transactions and time period (432 U.S. at 150, n.16, 53 LEd2d at n.16, 170), Mr. Justice White's partial dissent

was ascribed, in part, to the reason that the conspiracy proved (§846) was not used to establish the continuing enterprise charged (§848). (432 U.S. at 158, 53 LEd2d at 184-185). The conceptual significance of this circumstance is that whether or not a specific conspiracy or substantive violation, occurring within the time-frame of a continuing enterprise count, is "used" in obtaining the conviction of the continuing offense, the defendant is not constitutionally subject to multiple, cumulative, successive trial and punishment.

CONCLUSION

Review of the Court of Appeals decision is necessary to vindicate Defendant's constitutional rights herein, to reinstate the order of the District Court properly dismissing the Indictment under the controlling authority of *Jeffers v. United States, supra.*

In any aspect of this case depends upon a determination of the extent to which the Massachusetts violations were used in the Texas trial, the Defendant should be granted a remand of proceedings further to develop the facts on any such issue, in accordance with requirements of procedural due process.

Respectfully Submitted:

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Attorney for Petitioner:
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APPENDIX A

UNITED STATES of America,
Appellant,

v.

Jamiel CHAGRA, Defendent, Appellee.

No. 80-1708.

United States Court of Appeals,
First Circuit.

Argued May 8, 1981.

Decided June 30, 1981.

Defendant moved for dismissal of indictment charging conspiracy to import, importation, conspiracy to possess for distribution, and possession for districution of quantity of marijuana. The United States District Court for the District of Massachusetts, Walter Jay Skinner, J., 494 F.Supp. 908, dismissed and the United States appealed. The Court of Appeals, Breyer, Circuit Judge, held that conviction of defendant in Texas for violating statute imposing heavy penalties upon those who engage in drug-related continuing criminal enterprise did not bar, on double jeoparty basis, subsequent prosecution for drug-related felonies which were

allegedly committed in Massachusetts and which might have been, but were not, used to prove the continuing criminal enterprise violation, especially where there were 20 other defendants who might be most easily tried in Massachusetts and it was not legally possible to try defendant on two of the counts in Texas.

Reversed.

Janis M. Berry, Asst. U.S. Atty., Boston, Mass., with whom Edward F. Harrington, U.S. Atty., Boston, Mass., was on brief for appellant.

Oscar B. Goodman, Las Vegas, Nev., for appellee.

Before COFFIN, Chief Judge, CAMPBELL and BREYER, Circuit Judges.

BREYER, Circuit Judge.

This case involves a series of "double jeopardy" questions arising out of defendant's conviction in Texas for violating 21 U.S.C. § 848, which imposes heavy penalties upon those who engage in a drug-related "continuing criminal enterprise." Does an indictment under § 848 charge a single continuing offense that encompasses all drug-related felonies that might have been used to prove that defendant was engaged in the "enterprise"? If so, does a conviction bar a subsequent prosecution for drug-related felonies that might have been, but were *not* used to prove the § 848 violation? The district court answered these questions affirmatively and dismissed a four count indictment charging defendant with conspiracy to import, importing, conspiracy to possess, and possessing marijuana—all in Massachusetts. *United States v. Chagra,* 494 F.Supp. 908 (D. Mass. 1980), as modified at September 29, 1980 hearing, at transcript pages 7–9. We disagree with the district court and reverse its dismissal of the indictment.

I.

Section 848 states that a person "who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment" of 10 years to life, a fine of up to $100,000 and forfieture of all profits from the enterprise. It then defines the violation more specifically: A person engages in a continuing criminal enterprise if (1) he violates any felony provision of the Comprehensive Drug Abuse Prevention and Control Act or the Controlled Substances Import and Export Act, and (2) the violation is part of a continuing series of violations undertaken in concert with five or more other persons, he organizes, manages or supervises those others, and he derives substantial income from the activity.[1] The

[1] Section 848 provides in part:

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occpies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

courts have defined "continuing series" to mean three or more violations. *United States v. Valenzuela,* 596 F.2d 1361 (9th Cir. 1979). Thus, the statute is aimed at drug ring managers or "kingpins", and it defines their role in terms of supervising others while engaged in three or more drug felonies.

The government indicted Chagra, the defendant, in the Western District of Texas on July 31, 1979.[2] The first three counts of the indictment charged conspiracies to import marijuana and cocaine and possession of cocaine, all in 1977. The fourth count charged a violation of § 848. It alleged that Chagra committed fourteen relevant underlying drug felonies between April 1974 and April 1978, in concert with at least five other persons whom he organized, managed or supervised. These fourteen consisted of those charged in the first three counts and eleven others, seven of which took place in 1977 or 1978, one of which took place on December 30, 1976, and three of which took place in 1974. After trial, Chagra was convicted on counts three and four. He was sentenced to thirty years imprisonment on count four (the § 848 count).[3] His appeal from that conviction is currently pending.

In May 1980, Chagra, together with twenty other persons, was indicted in Massachusetts for offenses centered upon the importing of 54,000 pounds of marijuana at Folly Cove, Gloucester in July 1975. Counts one and three of the four count indictment against Chagra charged him with conspiring to import and to distribute marijuana during 1975. Counts two and four charged him with importing and possessing marijuana at Folly Cove in July 1975.

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[2]This opinion refers to the Superseding Indictment, renumbered by order of the Texas district court to remove certain counts withdrawn from consideration by the jury.

[3]Fifteen of these thirty years were to be served concurrently with his sentence on count three.

In July 1980, the district court considered defendant's motion to dismiss the Massachusetts indictment on grounds of double jeopardy. The court agreed with the government that these charges and the Texas charges were different: the facts alleged were different, the times of the specific actions charged were different, the evidence was different. Nonetheless, the court reasoned that the events charged in Massachusetts "fall squarely within the period of continuous violations charged in the Texas indictment." Moreover, the Texas indictment referred to violations committed in "divers other placed to the grand jurors unknown." And, evidence of the Massachusetts violations might have been admitted in Texas to show additional felonies underlying the § 848 charge. Therefore, the court severed and continued counts one and three (the conspiracy counts). The court proceeded with counts two and four, reasoning that they could not have been charged in Texas because venue would not have been proper there; but subsequently, the district judge changed his mind about the importance of lack of venue. Then, to simplify the case, while expediting appeal, the parties agreed to conduct a bench trial. The court found Chagra guilty on counts two and four and sentenced him; it then vacated that determination; it also vacated the order severing counts one and three; and it dismissed all four counts on grounds of double jeopardy. The government appeals from this latter determination.

II.

The "double jeopardy" clause of the fifth amendment states "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The issue here is whether the Texas and Massachusetts proceedings involve "the same offence". We hold that they do not.

As an initial matter, a common sense reading of the two indictments, together with the facts as stipulated and the record of Texas proceedings as described, suggests, that the two sets of charges do not grow out of a single criminal act, occurrence, episode or transaction. *See Brown v. Ohio,* 432 U.S. 161, 170, 97 S.Ct. 2221, 2227, 63 L.Ed.2nd 187 (1977) (Brennan, J., concurring). For one thing, the times during which specific activities allegedly occurred differed. The Massachusetts violations all took place in 1975. The Texas offenses took place in 1977, 1978, in December 1976 and in 1974. For another thing, those involved in the two offenses are different. With the exception of Chagra himself, none of the twenty-one persons mentioned in the Massachusetts indictment were referred to in any part of the Texas indictment. Further, the places differ. The Texas indictment does not refer to Massachusetts, nor is there any reason to believe that the cryptic phrase, "divers other places to the grant jurors unknown", masked an overlap of geographical areas. *See United States v. Papa,* 533 F.2d 815, 822 (2d Cir. 1976). In addition, the evidence used to prove the offenses differed. Apart from a passing reference to Massachusetts (which the district court found insignificant) no evidence about the Massachusetts offense was introduced into the Texas proceeding; and, a reading of the stipulated Massachusetts facts indicates that evidence of the Texas offenses did not help to prove the Massachusetts charges.

Given these differences, a claim of double jeopardy ordinarily could not be sustained even if the offenses charged in the two indictments had been the same. If, for example, conspiracies to posess, or to distribute, or to import, controlled substances had been charged in both indictments, the factors set out above indicate they would have been considered separate, free-standing conspiracies, for which separate indictments, trials and punishments are proper. *United States*

v. Marable, 578 F.2d 151, 154 (5th Cir. 1978); *United States v. Stricklin,* 591 F.2d 1112, 1122–23 (5th Cir. 1979); *United States v. Papa, supra.* The fact that the offenses charged here arise under *different* statutory provisions would ordinarily weaken the case for "double jeopardy" still further, *see United States v. Marable, supra.*

Defendant here, however, argues that the *special* relation between § 848 and the drug felonies that potentially underlie a § 848 charge creates double jeopardy where otherwise none would exist. He argues that these latter violations are all "lesser included offenses" in the § 848 "continuing criminal enterprise". The government, he argues, cannot indict him for both the "enterprise" and any contemporaneous offenses that *might* have constituted a part of that enterprise, whether or not those lesser offenses were "free standing" in relation to each other. *See United States v. Mannino,* 635 F.2d 110 (2d Cir. 1980).

[1] Essentially, defendant is making a "unit of prosecution" point. It has long been the law that a prosecutor cannot divide a continuing crime into bits and prosecute separately for each. In 1777, for example, Lord Mansfield held that a statute prohibiting working on Sunday allowed the Crown to convict a baker only once for baking four loaves of bread on one Sunday; it could seek only one penalty of five shillings; it could not convict him four times, once for each loaf, and fine him one pound. *Crepps v. Durden,* 2 Cowper's Reports 640, 98 Eng.Rep. 1283 (K.B.1777). In the nineteenth century, the Supreme Court held that the federal government could prosecute a Mormon only once for cohabiting for three years straight with more than one woman as his wife; it could not prosecute him three times, once for each year. *In re Snow,* 120 U.S. 274, 7 S.Ct. 556, 30 LEd 658 (1887). Just as the man who steal $100 from a billfold can be prosecuted once for the $100 theft and not ten times for ten $10 thefts, so, in

defendant's view, he can be prosecuted only once for all those violations so interrelated that they make up a single "continuing criminal enterprise". The very fact that the Massachusetts violation *might* have been introduced into the Texas proceeding shows that it bears the necessary relation to the other violations[4] that were introduced as underlying felonies, and it is thus part of the single prosecutable unit "enterprise".

Defendant draws additional force for his argument from *In re Nielsen,* 131 U.S. 176, 9 S.Ct. 672, 33 LEd 118 (1880). In that case, defendant had previously been convicted of cohabiting with more than one woman as his wife for a period up to May 13, 1888. The Court held that he could not subsequently be prosecuted for adultery on May 14, 1888, with one of these women because the cohabitation charged (which as a prosecutable unit lasted through May 14 and beyond) included a necessary incident the adultery that was charged. The Supreme Court there wrote that the case illustrated the proposition of *Morey v. Commonwealth,* 108

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[4]Defendant points to *United States v. Mannino,* 635 F.2d 110, 117 (2d Cir. 1980) for additional support for this view. There, an isolated drug pickup in Florida in 1975 was included among the series of transactions constituting a § 848 continuing criminal enterprise centered in Brooklyn in 1978–79. There was no factual overlap with the other transactions making up the enterprise other than the defendant's role as orchestrator of each. The court termed it a "less structured enterprise" than those involving well-defined chains of command under the control of a "kingpin". *United States v. Mannino,* 635 F.2d at 117. It appears that Mannino acted "in concert" with an associate in Florida separately from his actions "in concert" with others in Brooklyn. Whether or not *Mannio* is consistent with the "in concert" requirement as interpreted in *Jeffers v. United States,* 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), is unclear. Regardless, the court in *Mannio* did not consider the issue presented here. In any event, as part III of this opinion indicates, there is no inconsistency in saying that a separate offense *might* be used as part of a § 848 trial, but if it is not so used, it can be prosecuted and punished separately.

Mass. 433, 435 (1871), in which Mr. Justice Gray wrote: "A conviction of being a common seller of intoxicating liquors has been held to bar a prosecution for a single sale of such liquors within the same time, upon the ground that the lesser offense . . . is merged in the greater offense . . . ." *In re Nielsen,* 131 U.S. at 188, 9 S.Ct. at 676. The bar would presumably still stand in *Morey* even if the particular sale was not used as evidence in the "common seller" trial; the bar stood in *Nielsen* even though the adultery was not (and could not have been) used in evidence at the cohabitation trial. Defendant concludes that conviction for the greater offense—the continuing criminal enterprise—bars a prosecution for any lesser drug offense that was *in fact* incident to it—whether or not used as evidence at the "enterprise" trial. While the district court accepted this argument, we do not, for reasons which follow.

III.

It is not possible to determine whether or not the "double jeopardy" clause bars the Massachusetts indictment on the basis of defendant's logic alone. Even if defendant's argument were sufficient to make out some sense in which the Massachusetts charges would be called "lesser included", that fact would not tell us by itself when, whether or where additional punishment for, or trials upon, those charges if forbidden, *see Brown v. Ohio,* 432 U.S. at 169 n.8, 97 S.Ct. at 2227 n.8. The Massachusetts charges are not included in the § 848 offense as a matter of logic; the transactions at issue are factually separate; the Massachusetts violations were not used in evidence at the § 848 trial; and there is no indication that the prosecutor deliberately separated the Massachusetts

charges in order to have a second bite at the § 848 apple.[5] Further, an examination of the interests served by the "double jeopardy" clause and the legislative and prosecutorial interests served in allowing additional punishment and an additional trial suggests that the Massachusetts prosecution does not violate that clause.

[2] The "double jeopardy" clause in part prevents a defendant from being punished more than once for the same crime. *Ex parte Lange,* 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873); *North Carolina v. Pearce,* 395 U.S. 711, 89 SCt 2072, 23 LEd2d 656 (1969). *See* Western & Drubel, *Toward A General Theory of Double Jeopardy,* 1978 Sup.Ct.Rev. 81, 107–22, 156–63 (1979); Comment, *Twice in Jeopardy,* 75 Yale L.J. 262, 281–83 (1965). It also seeks to prevent a person from being tried twice for the same crime. In principle, these purposes are conceptually distinct, for one might, through the use of concurrent sentences, allow two trials but prevent two punishments. While the cases do not always distinguish the general policies that the clause serves, *Brown v. Ohio,* 432 U.S. at 166, 169 n.8, 97 S.Ct. at 2225, 2227 n.8, it is useful to do so here for purposes of analysis.

[3, 4] When courts have held that the "double jeopardy" clause prevents double sentencing, they have typically imposed restrictions upon the prosecutor's power to interpret a statute to allow multiple punishments; they have not restricted the legislature's power to enact such a statute. Iannelli v. United States, 420 U.S. 770, 791, 95 S.Ct. 1284, 1296, 43 L.Ed.2d 616 (1975); Western & Drubel, *Toward A General Theory Of Double Jeopardy,* 1978 Sup.Ct.Rev. 81, 99–106, 112–22 (1970); Comment, *Twice In Jeopardy,* 75 Yale L.J.

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[5] A passing, hearsay reference was made at the Texas trial by one witness, Mr. Wallace, to a Boston deal to import marijuana. The district court considered this and ruled that "evidence of this [Massachusetts] case was not really introduced into that Texas trial."

262, 313–17 (1965). There is little doubt that the English Parliament could have made each Sunday sale of a loaf of bread a crime had it chosen to do so. Indeed, the legislature often allows cummulative punishment for an act, when it violates several statutes (such as those forbidding possessing, distributing, or importing dangerous drugs). And, as the Supreme Court has suggested, a legislature could allow multiple cumulative punishments for, say, car theft and lesser included offenses (such as joyriding), if it chooses to do so. *Brown v. Ohio,* 432 U.S. at 169 n.8, 97 S.Ct. at 2227 n.8; *Bell v. United States,* 349 U.S. 81, 82–83, 75 S.Ct. 620, 621–22, 99 L.Ed. 905 (1955) ("Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported." Congress can "make each stick in a faggot a single criminal unit." (Frankfurter, J.)). When multiple punishments are at issue, the "double jeopardy" clause seems to require the legislature to speak clearly before imposing additional punishment. *Id.* But, where a clear and reasonable intent can be determined from the statute, the clause does not appear to stand in the way of its implementation. *Gore v. United States,* 357 U.S. 386, 390–91, 78 S.Ct. 1280, 1283, 2 L.Ed.2d 1405 (1958) ("If the legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter [on narcotics offenders]" (Frankfurter, J.)).

In this instance, there is good reason to believe that Congress intended in the § 848 offenses and underlying violations that were not specifically charged in the § 848 proceeding to be punished cumulatively. First, § 848 was deliberately intended as a harsh statute providing particularly severe punishments for multiple offenders. It originated in a provision that was designed to provide severe sentences for

professional criminals fitting the status of "dangerous special offenders" and, as enacted, the legislation separately defined a continuing criminal enterprise as a new offense and imposed harsh penalties. H.R.Rep.No. 1444, 91st Cong.2d Sess. (1970), U.S. Code Cong. & Admin.News 1970, p. 4566; *see also* 116 Cong.Rec. 995 (1970) (remarks of Sen. Dodd); *id.* at 1181 (remarks of Sen Thurmond); *id.* at 33631 (remarks of Rep. Weicker); *id.* at 33314 (remarks of Rep. Bush). While its history might suggest an intent not to punish for both the § 848 violation and the offenses used to prove that violation, *see Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), there is no evidence of any intent to forego additional punishment for underlying offenses not so used. Second, to accept defendant's interpretation of the statute would undercut the very "anti-drug" philosophy that § 848 embodies. On defendant's view, once a person committed sufficient underlying offenses to "quality" for § 848, he would have diminished incentive to stop committing offenses. Cumulative punishment for additional underlying offenses, on the other hand, would provide a continuous incentive for him to stop engaging in drug-related activity. Third, to accept defendant's interpretation would create a serious problem of enforcement. Prosecutors would soon realize that if they bring a § 848 prosecution and lose, they will have immunized defendants not only as to the underlying offenses they actually tried to prove, but also as to all related drug offenses committed during the "enterprise" period charged. They may well hesitate to run such a risk, weakening the deterrent effect of the statute.

Similarly, even if cumulative punishments were not allowed,[6] there would be good reasons for allowing separate

[6] In *Jeffers v. United States*, *supra*, where the Court found that the legislature did not intend multiple punishment, it held that Jeffers was constitutionally entitled on a § 848 offense for the sentence he had already received on a lesser included offense under § 846.

trials in Massachusetts and Texas. The logistical reasons for trying this case in Massachusetts are strong: the crime took place here, and there are twenty other defendants who may be most easily tried in Massachusetts. Moreover, in this instance, it is not legally possible to try Chagra on counts two and four in Texas. U.S. Const. Amendment VI; Fed.R. Crim.P. 18; *United States v. Black Cloud,* 590 F.2d 270 (8th Cir. 1979). Thus, the legislative and prosecutorial interests favoring both cumulative trials and cumulative punishments are strong.

At the same time, it is difficult to find interests underlying the "double jeopardy" clause with which double trials or punishments would significantly interfere. There is no possibility here of cumulatively punishing defendant for engaging in the same underlying activity. *United States v. Stricklin,* 591 F.2d at 1123. Neither the judge nor the jury in the Texas proceeding could have used Chagra's Massachusetts activity as a basis for assessing his punishment, for they did not know about that activity. Chagra is not being required to relitigate any actual circumstances at issue in the first trial. He does not have to fear, or listen to, or prepare a defense for, the presentation of a single set of facts on more than one occasion. *Green v. United States,* 355 U.S. 184, 197, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). To try Chagra in Massachusetts violates no "finality" policy favoring the absolute inviolability of a jury acquittal *Sanabria v. United States,* 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978). Since the facts presented in Massachusetts are totally different from those presented in Texas, there has been no opportunity for a jury to assess them favorably or unfavorably. Nor is the prosecutor being given a second opportunity to increase the punishment assessed for a signel set of activities. *Illinois v. Somerville,* 410 U.S. 458, 469, 93 S.Ct. 1066, 1072, 35 L.Ed.2d 425 (1973). Finally, there is here no improper delegation of the setencing power

from the legislature to the prosecutor. The legislature, for reasons pointed out above, is likely to have intended cumulative punishment in the circumstances here described. *Gore v. United States, supra.*

The authority on the question would seem to support the conclusion that double jeopardy does not bar the Massachusetts prosecution. In *Jeffers v. United States, supra,* the Supreme Court strongly suggested that § 846, forbidding conspiracies to distribute drugs, was a "lesser included offense" in respect fo § 848. The Court reasoned that the word "concert" in § 848 was intended "to have its common meaning of agreement in a design or plan". Thus, proof of the § 848 violation would automatically show a violation of § 846. "So constructed, section 846 is a lesser offense of section 848 because section 848 requires proof of every fact necessary to show a violation under section 846 as well as proof of several additional elements." *Jeffers v. United States,* 432 U.S. at 150, 97 S.Ct. at 2215. On the basis of this test, the Massachusetts violation is not a lesser included offense, because proof of the Texas violation did not prove *any* of the facts necessary to show the Massachusetts violations, let alone *all* of them. Indeed, were defendant's theory the law, the Court's analysis in *Jeffers* of the relation of actions "in concert" to "conspiraaacy" would have been completely unnecessary, for it was obvious that the § 846 offense there at issue might have been used as one of the underlying § 848 violations. Rather, the analysis became necessary because the *same facts* were used to show *both* § 848 and § 846 offenses; the issue was whether Jeffers could be punished separately for two offenses stemming from these *samefacts*; and the Court held it could not.

In *Brown v. Ohio, supra,* the Supreme Court held that Ohio could not prosecute a defendant first for stealing a car and then for joyriding. The offense of joyriding was identical

to that of auto theft except that the latter required proof of an intent not to return. Thus, 'joyriding" was a lesser included offense. Under these circumstances there could be only one prosecution for a single act of taking and keeping an auto for nine days. But, the court cautioned, "We would have a different case if the Ohio Legislature had provided that joyriding is a separate offense for each day in which a motor vehicle is operated without the owner's consent. *Cf. Blockburger v. United States,* 284 U.S. [299] at 302 [52 S.Ct. 180, at 181, 76 L.Ed. 306]." *Brown v. Ohio,* 432 U.S. at 169 n.8, 97 S.Ct. at 2227 n.8. Indeed, in the latter instance, the Court would have been faced with a legislative intent to increase the punishment for each additional day the car was kept—a rational purpose aimed at encouraging a thief to return the car. There is reason to believe that Congress here similarly intended additional punishments for additional drug felonies. Thus, the implication in *Brown v. Ohio*, that double jeopardy does *not* apply in such a case, would seem to fit the facts here before us.

In re Nielsen, supra, on which defendant so heavily relies, is distinguishable. In that case, there was no ascertainable legislative purpose served in punishing a man both for living with more than one woman as his wife (cohabitation) and for the "lesser included" adultery, nor for cumulating punishment by punishing each adulterous act separately.[7] Though one could argue that doing so would also discourage continued cohabitation, it would also have produced a possible punishment for cohabitation vastly out of proportion to what the legislature might reasonably have had in mind in enacting the

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[7]Mr. Justice Bradley explicitly considered the different legislative purposes behind the anti-polygamy statute, and noted that Nielsen was being brought to trial on the same underlying facts in the two indictments—which is not the case here. *In re Nielsen,* 131 U.S. at 177, 188–89, 9 S.Ct. at 673, 676–677.

cohabitation statute. Here, on the other hand, the cumulative punishment for additional drug violations, not included in the original § 848 charge, would not produce a similar disproportionate penalty, given the legislature's concerns as revealed in the statute's history.

[5] Thus, reasons of policy and precedent suggest the absence of "double jeopardy" here. The ordinary meaning of the words "same offense" in the fifth amendment, given the very different underlying facts in the two indictments, also suggests that the "double jeopardy" clause does not apply to this case. We therefore reject defendant's claim that double jeopardy automatically attaches to under lying offenses that might have been used to help prove a § 848 violation—when those violations were not in fact so used.[8] We hold that there is no double jeopardy here and that the Massachusetts indictment must be reinstated.

Reversed.

[8]Defendant also argues that he should be allowed to prove that the underlying facts in the Texas and Massachusetts prosecutions are overlapping. We have not reviewed the Texas transcript which was offered to, but not accepted by, the district court. Yet, we have reviewed the stipulation of Massachusetts facts and the Texas indictment, and we note that the parties have had the opportunity to present to the district court instances of overlap. On the basis of what has been presented we do not believe that defendant has made out a *prima facie* case of possible double jeopardy. *United States v. Stricklin*, 591 F.2d at 1122–23.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1708.

UNITED STATES OF AMERICA,
Appellant,

v.

JAMIEL CHAGRA,
Defendant, Appellee.

Coffin, Cheif Judge,
Campbell, Bownes and
Breyer, Circuit Judges.

ORDER OF COURT
Entered August 21, 1981

Upon consideration of appellee's petition for rehearing and suggestion of need for rehearing en banc,

It is ordered that said petition and suggestion are hereby denied.

By the Court:
/s/ DANA H. GALLUP

[cc: Ms. Berry and Mr. Goodman.]

Clerk.

APPENDIX C

UNITED STATES of America

v.

Jamiel CHAGRA et al.

Crim. No. 80–00165–S.

United States District Court,
D. Massachusetts.

July 30, 1980.

Defendant moved to dismiss indictment charging conspiracy to possess for distribution, and possession for distribution of quantity of marijuana. The District Court, Skinner, J., held that defendant's conviction in Texas of violation of narcotics statute was no bar to prosecution in Massachusetts for narcotics violations which allegedly were entirely perpetrated in Massachusetts, even though evidence of alleged violations occurring in Massachusetts would have been admissible as cumulative evidence in Texas prosecution, since the Texas court did not have power to impose punishment for such crimes; however, other alleged narcotics violations, which were lesser included offenses capable of being independently prosecuted and punished in Texas,

would be barred by the Texas conviction upon affirmance on appeal.

Motion denied in part; two counts of indictment severed insofar as they charged defendant with conspiracy.

Martin Boudreau, Dept. of Justice, Boston, Mass., for United States.

Annette R. Quintana and Oscar B. Goodman, Las Vegas, Nev., for defendants.

SKINNER, District Judge.

The defendant moves to dismiss this indictment charging conspiracy to import, importation, conspiracy to possess for distribution and possession for distribution of a quantity of marijuana. All of these charges relate to the alleged illegal importation of marijuana at Folly Cove, Gloucester, Massachusetts during the period July 22–25, 1975 and its subsequent distribution. The attendant conspiracies are alleged to have continued for the entire calendar year 1975.

Defendant Chagra asserts that prosecution of this indictment is barred by his prior conviction in the United States District Court for the Western District of Texas, El Paso Division, for engaging in a continuing series of violations of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* in violation of 21 U.S.C. § 848. *United States v. Chagra,* Criminal No. EP–79–CR–91.[1] The period included in the alleged continuing offense was from April 1, 1974 to April 8, 1978. The series of offenses charged include numerous incidents of illegal importation and possession of marijuana and cocaine on various dates in 1974, 1976, 1977 and 1978.

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[1]An appeal of this conviction is presently pending before the Court of Appeals of the Fifth Circuit.

The events charged in the present indictment were not mentioned in the Texas indictment. The defendant apparently concedes that no evidence of his alleged 1975 activity was introduced in the trial of that case.

The events alleged in the present indictment fall squarely within the period of continuous violations charged in the Texas indictment and fit equally squarely within the description of the continuous illegal conduct therein; namely, violations of 21 U.S.C. § § 841, 846 and 952, and specifically trafficking in marijuana and cocaine.

Conspiracies to violate these sections are lesser included offenses under § 848. *Jeffers v. United States,* 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977). Under the principles affirmed in that case, there can be no doubt that the substantive violations of § § 841 and 952 are also lesser included offenses. *Brown v. Ohio,* 432 U.S. 161, 166, 97 S.Ct. 2221, 53 L.Ed.2d (1977); *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). The Court in *Jeffers* held further that, absent special circumstances constituting a waiver of the defense, conviction of the waiver of the defense, conviction of the greater crime (§ 848) barred prosecution of lesser included offenses on the ground of double jeopardy.

Even though the Massachusetts crimes were not specified, the Texas indictment referred to "divers other places to the grand jurors unknown." Evidence of the Massachusetts violations was admissable to establish the continuing series of violations alleged in the indictment. *United States v. Bergdoll,* 412 F.Supp. 1308, 1318 (D.Del. 1976). Although the indictment refers to a continuing series of violations, the statute actually prohibits engaging "in a continuing criminal enterprise." Continuity is a material element of the crime charged. The charge, and presumably the evidence, concerned violations in 1974 and 1976, 1977 and 1978. The

jury's verdict of guilt of the continuing offense necessarily imports a finding that the defendant was engaging in a criminal enterprise during 1975. Evidence of the acts charged in the present case was not necessary to support that finding, but would have been admissible cumulative evidence.

This motion thus raises the following very narrow issue: Does a conviction under 21 U.S.C. § 848 bar a subsequent prosecution for lesser included crimes committed within the alleged period of the continuing criminal enterprise, evidence of which would have been admissible as cumulative evidence in the trial of the § 848 indictment but was not offered by the prosecution?

In most cases dealing with successive prosecutions for greater and lesser included offenses, the courts were dealing with a single event and basically identical evidence in each case; *e.g.*, murder/assault and battery; robbery/assault; robbey/larceny from the person, etc. In *Jeffers, supra,* the court dealt with identical evidence on both charges and to a lesser extent, so did the Court in *Brown, supra.* In *United States v. Stricklin,* 591 F.2d 1112 (5th Cir. 1979), *cert. denied,* 444 U.S. 963, 1000 S.Ct. 449, 62 L.Ed.2d 375 (1979), the court appeared to restrict the bar of double jeopardy in successive prosecutions under § 846 and § 848 (in either chronological order or simultaneously) to charges involving evidence substantially identical to that actually introduced in the prior trial.[2]

In the present case, however, where the greater crime is a continuing offense, and was prosecuted first, there is an argument in principle and some persuasive authority for a

[2]Subject to the possible exception that if the facts necessary to sustain the more serious charge are not known to the government at the time of the first prosecution, the government may thereafter proceed to prosecute the greater offense.

broader application of the bar. In the first place, the jury has already, by necessary implication, found that the defendant was engaged in a criminal enterprise which included the importation and distribution of marijuana during the year 1975. The finding of continuity was material under § 848, and a necessary predicate to the imposition of the very serious penalties imposed under § 848. Furthermore, while I have found no cases on forfeiture, the defendant's present conviction would appear to warrant forfeiture of his profits from the importation and possession of marijuana at Folly Cove and its subsequent distribution. Under the statute, it would appear to be the defendant's status as an entrepreneur which warrants the forfeiture of profits, whether or not they were derived from specific violations established in the criminal case. The defendant has in short suffered the same jeopardy in terms of potential penalty and potential forfeiture as he would have if the evidence of the Massachusetts cases had been introduced in the Texas case. The underlying purpose of the constitutional prohibition against multiple prosecution has equal application in principle to these related cases regardless of the election or failure of the government to introduce evidence of the Massachusetts cases in the Texas trial.

Authority on the point is scarce and ancient, but in my view persuasive. In *Ex parte Nielsen,* 131 U.S. 176, 9 S. Ct. 672, 33 L.Ed 118 (1889), it was held that conviction of cohabiting with more than one woman between October 15, 1885 and May 13, 1888 barred a subsequent prosecution for adultery with one of the same women said to have occurred on May 14, 1888. It does not appear that evidence of intercourse was introduced in the earlier offense. The Court quoted 131 U.S. at 188, 9 S.Ct. at p. 676, from *Morey v. Commonwealth,* 108 Mass. 433, 435 (1871):

> The test is not, whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.

The court at p. 189 also quotes *Wharton's Treatise on Criminal Law,* Vol. a, § 560, as follows:

> An acquittal or conviction for a greater offense is a bar to a subsequent indictment for a minor offense included in the former, wherever, under the indictment for the greater offense, the defendant could have been convicted of the less;

The rule is stated in substantially the same terms in *Wharton Criminal Law and Procedure* (Anderson), 1957, § 148.

The government's knowledge of the offense subsequently prosecuted at the time of the prior trial is apparently immaterial, as conceded by the Assistant United States Attorney in argument before me. The only exception to this rule, if it is an exception, occurs ". . . when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun. [Citations] . . . This exception may also apply when the facts necessary to the greater were not discovered despite the exercise of due diligence before the first trial." *Jeffers v. United States,* 432 U.S. at 151–2, 97 S. Ct. at 2216–17. In the present case the greater offense was tried first and the exception does not apply.

[1] Accordingly, I conclude that prosecution of lesser included offenses is ordinarily barred by conviction of the greater offense where evidence of the lesser offenses would have been admissible as cumulative evidence in the trial of the greater offense, but was not in fact offered.

In the present case, however, there is a further question which has not been addressed in the decided cases, as far as I know. In all of the cases which have come to my attention, the court in which the first conviction was entered has had jurisdiction over the lesser included offense. If the second prosecution is barred under the cicumstances which I have posited, the bar is dependent on jeopardy, which implies the

power of the court to punish for the crime, *e.g.*, the existence of subject matter jurisdiction.

[2] We have now to deal, for I believe the first time, with prosecution in Texas of a criminal enterprise of national scope under § 848 in which some of the component lesser included crimes could not have been prosecuted in Texas *Cf. United States v. Fry,* 413 F.Supp. 1269 (E.D.Mich.1976). In particular, Counts II and IV of the present indictment, which clearly allege aspects of a continuing drug enterprise covering 1975, could not have been independently prosecuted in the Western District of Texas, because the entire crimes alleged were perpetrated in the District of Massachusetts. United States Constitution, Amendment VI; Fed.R.Crim.P. 18. While the cited venue provisions are not strictly jurisdictional, in the sense that they may be waived by the defendant, venue is a matter of important public policy, and proof of proper venue, in the absence of a waiver, is necessary for a conviction. *United States v. Black Cloud,* 590 F.2d 270 (8th Cir. 1979).

[3] Counts I and III of the present indictment do not raise this problem, since the conspiracies therein alleged are said to have taken place over a 12-month period in a number of localities, including El Paso, which is within the Western District of Texas. On familiar principles, a conspiracy indictment may be returned and tried in any district wherein either the agreement itself or any act in furtherance of it took place. *Bellard v. United States,* 356 F.2d 437 (5th Cir.) *cert. denied,* 385 U.S. 856, 87 S.Ct. 103, 17 L.Ed.2d 83 (1966).

[4] I rule that *in this case* the defendant's conviction in Texas of a violation of § 848 is no bar to prosecution in the present case of Counts II and IV of the indictment, because the Texas court did not have the power to impose punishment

for those crimes.[3] Accordingly, the defendant's motion to dismiss is DENIED as to Counts II and IV.

Conversely, I rule that the defendant's conviction of a violation of § 848 does bar prosecution of Counts I and III, because those were lesser included offenses which could have led to independent prosecution and punishment in the Western District of Texas. The conviction is presently on appeal, however, which creates yet another problem. It appears from the papers submitted that one of the grounds of appeal may be prosecutorial misconduct in the return of the indictment. It is conceivable therefore that the Court of Appeals may order dismissal of the indictment for grounds which would not support a claim of former jeopardy. *Cf. Sanabria v. United States,* 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978), and the discussion of the same case in the Court of Appeals, *United States v. Sanabria,* 548 F.2d 1, 6–7 (1st Cir. 1976).

Dismissal of Counts I and III of the indictments would be premature. These counts are accordingly severed insofar as they charge Jamiel Chagra with conspiracy. I shall withhold action on this motion to dismiss with respect to such counts until the disposition of the defendant's appeal from his conviction in the Western District of Texas under § 848. These counts shall stand continued as to him until such time

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[3]Lack of power to punish might not always be determinative. Suppose that evidence of a crime committed wholly in Massachusetts were actually introduced in a § 848 prosecution elsewhere, and the evidence thereof provided an essential element of the § 848 offense, *e.g.*, that the defendant acted in concert in a supervisory capacity with five others. It might well be that a subsequent prosecution would be barred even though the court trying the § 848 case did not have the power to punish the lesser included offense. I need not resolve that case, but note it only to point out that analysis of double jeopardy in this context is much like peeling an onion, and my ruling is directed to the facts of this case only.

as a copy of the opinion of the Court of Appeals is filed in this court with proof that its mandate has issued to the District Court. All the time from the date of this order until the time of such filing shall be excludable time under the Speedy Trial Act, 18 U.S.C. § 316(h)(1)(D) and § 316(h)(8), for the reasons above stated.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Cr. No. 80–165–F SKINNER, D.J.

UNITED STATES OF AMERICA

v.

JAMIEL CHAGRA

Trial

APPEARANCES:

Martin Boudreau, Special Attorney, Department of Justice and Judd Carhart, Assistant United States Attorney, on behalf of the government.

Oscar Goodman, Esq., on behalf of the defendant.

Courtroom No. 6
Federal Building
Boston, Massachusetts
10:00 a.m., Monday
September 29, 1980

MR. GOODMAN: Your Honor, if it please the Court, Mr. Chagra is still reviewing the stipulation.

THE COURT: Fine.

(Pause.)

THE COURT: I take it, now, that the present motion by both parties is to sever the remaining counts insofar as they deal with the defendant, Jamiel Chagra, and proceed with a trial without jury; is that it?

MR. BOUDREAU: That is correct, in relation to the government, your Honor.

THE COURT: Mr. Chagra, do you understand you have a constitutional right to have all the counts of this indictment to be charged before a jury?

MR. CHAGRA: Yes.

THE COURT: You discussed with Mr. Goodman the merits of waiving a jury in this particular situation?

MR. CHAGRA: Yes.

THE COURT: All right.

And it's your desire to go forward without a jury?

MR. CHAGRA: Yes.

THE COURT: All right. I will approve the jury trial waiver.

We will proceed to trial.

MR. GOODMAN: Yes, your Honor.

MR. BOUDREAU: Your Honor, in addition to waiving the jury the government and the defendant, Jamiel Chagra, through counsel have agreed to proceed before the Court on a set of stipulated facts, your Honor.

I have the original stipulation in front of me, prepared this date in addition; to being reviewed and signed by myself on behalf of the government, it has been reviewed by Mr. Chagra and his counsel, Mr. Goodman, and Signed by all of the parties. I have the original of that stipulation bearing the

appropriate signatures, your Honor, which I will hand up to the clerk.

THE COURT: All right.

This stipulation as to what certain witnesses would testify, as I read it. It starts out with certain testimony which would be provided by Scott Emlong. And David Thomas would testify more or less corroborating the statements of Emlong spelled out on this stipulation. Also, that he picked up money in excess of a $100,000 from Jamiel Chagra on or about August 19th, 1975, which was then transported to Peter Krutschewski.

Daniel Cacy would testify that he participated in the off-loading of marijuana and would testify as to Mr. Chagra's supervision and of some other people that were doing the same work.

Mr. Chagra, you have read this stipulation?

MR. CHAGRA: Yes, sir.

THE COURT: All right.

I will also say that I have listened to these same witnesses talk about this same subject in another case, and this is consistent with what they have testified to previously.

Do you want to offer any other testimony in this jury-waived trial, Mr. Goodman?

MR. GOODMAN: No. Mr. Chagra has no testimony.

THE COURT: On the basis of the testimony that would be introduced, that is, the stipulated testimony in this trial, I find the defendant guilty of counts two and four of the indictment.

In my order of July 30th I removed counts one and three from consideration for the time being.

MR. GOODMAN: Yes, your Honor.

THE COURT: Now, I'm prepared to move for a disposition, prepared to dispose of the case if your client waives his right to a pre-sentence report.

MR. GOODMAN: He has, your Honor. I've explained it

to Mr. Chagra that he does have a right to a pre-sentence report under Rule 32; however, under that same rule knowing that he waives his right to a pre-sentence report, he would like to be sentenced immediately.

THE COURT: Is that your position, Mr. Chagra?

MR. CHAGRA: Yes, sir.

THE COURT: I should also put on the record that I'm aware that Mr. Chagra has been convicted in the Western District of Texas and that matter was brought before me on the motion to dismiss on the grounds of double jeopardy. In the course of the case against Mr. Krutschewski, I heard quite a lot about Mr. Chagra and his various activities in various parts of the country, and I'm prepared to go forward with the sentencing on that basis.

Is there a recommendation from the U.S. Attorney?

MR. BOUDREAU: Yes, your Honor. The government recommends on count two of the indictment that the defendant, Jamiel Chagra, be sentenced to a term of five years to run concurrently with the sentence he is now serving, having been imposed in the United States District Court for the Western District of Texas.

On count four, a sentence of two years incarceration to run consecutively to the sentence in the Western District of Texas.

THE COURT: Do you wish to be heard?

MR. GOODMAN: Solely as to count four at this point in time, I respectfully ask the Court to consider a sentence, a term of imprisonment less than two years, somewhere between the period of one year or 18 months.

THE COURT: Do you wish to be heard on the matter of sentencing, Mr. Chagra?

MR. CHAGRA: No, sir.

THE COURT: I think in view of what I know of the defendant's background, I'm going to adopt the government's

recommendation. I, therefore, impose a sentence on count two—excuse me?

MR. GOODMAN: Count four, your Honor.

THE COURT: Count two.

On count two, custody of the attorney general for a period of five years. Said sentence to be served concurrently with the sentence which the defendant is now serving pursuant to the order of the District Court of the Western District of Texas.

On count four, I impose a period of custody of the attorney general of two years, said sentence to be imposed from and after the sentence imposed in count two and the sentence imposed by the District Court of the Western District of Texas.

MR. GOODMAN: If your Honor please, the Court at this time—we ask the Court to set aside the verdict and judgment of conviction and reconsider our motion for dismissal on the grounds of double jeopardy on all four counts.

THE COURT: All right.

I now move to the defendant's motion for reconsideration of my order of July 30, 1980, in which I concluded that the conspiracy parts of this indictment were barred by the double jeopardy provisions of the Constitution by reason of the previous conviction of the defendant in the Western District of Texas under 21 U.S. Code Section 848. At that time, however, I thought there might be a distinction with reference to the substantive offenses because the Western District of Texas did not have jurisdiction over those offenses. Since that time I have read the brief on reconsideration on which two points were raised: The first was that there was indeed evidence of the Massachusetts smuggling introduced into the Texas trial. This was supported by a page or so of transcript, and what I concluded to be very passing reference, and I stand by the original ruling that I made that evidence of this case was not really introduced into that Texas trial.

I am persuaded, however, that the issue of jurisdiction is not significant enough to justify a logical distinction between the substantive crime and the conspiracy charge with respect to the application of the bar of double jeopardy. In view of that conclusion, I'm going to modify the order of July 30, 1980, as follows: I rule that the substantive crimes charges in counts two and four of the indictment are equally barred by the prohibition against double jeopardy as a result of the conviction in the Western District of Texas under a Section 848 indictment that covered the entire period of 1975. I believe it went from 1974 to 1978, or some such period as that.

In order that this whole matter may be brought to the Court of Appeals for a determination, it all being a brand new matter, I'm going to vacate the order serving the counts one and three, the conspiracy counts, and order that all four counts be dismissed. Accordingly, I vacate the finding and judgment made this morning and order that the indictment be dismissed in its entirety with respect to Jamiel Chagra on the ground that prosecution of the charges described in those counts is barred by the double jeopardy provisions of the Constitution of the United States in view of the conviction in the Western District of Texas.

Now, the purpose of going through this procedure in the way that we have is to present this matter as expeditiously as possible for appeal to the Court of Appeals and resolution of the question of the effect of these Section 848 prosecutions.

If the government prevails, there will be no need for further trial. It will simply be open to the Court of Appeals to re-institute the findings and judgment that I entered this morning.

If the government doesn't prevail, the indictment stands as dismissed, and that disposes, I guess, of the part of the case.

MR. GOODMAN: Thank you, your Honor.

Your Honor, at this time I respectfully ask the Court for an order directing the marshal to return Mr. Chagra to the institution at Leavenworth.

THE COURT: Any objection?

MR. BOUDREAU: No objection.

THE COURT: That order is entered. Mr. Marshal, you can get him back on his way to Leavenworth.

Mr. Chagra's affection for Leavenworth continues to puzzle me.

MR. GOODMAN: Thank you, your Honor.

(Whereupon the trial was concluded.)

CERTIFICATE

I, Marie L. Cloonan, Official Court Reporter for the United States District Court, do hereby certify that the foregoing transcript from Page 1 to Page 10 constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the above entitled action.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	CRIMINAL NO. EP-79-CR-91
Plaintiff	*SUPERSEDING INDICTMENT TO MO-79-CR-6*
VS.	[Vio: 21 U.S.C. § 963–Conspiracy to import controlled substance; 21 U.S.C. § 841(a)(1) & 18 U.S.C. § 2–Aiding and abetting the possession of narcotic drug with intent to distribute; 21 U.S.C. § 848—Continuing criminal enterprise]
JAMIEL ALEXANDER CHAGRA, A/K/A JIM ALEXANDER	
Defendant	

THE GRAND JURY CHARGES:

COUNT ONE
[21 U.S.C. § 963]

That beginning on or before June 1, 1977, and continuing until on or about April 1, 1978, in the Western District of Texas, the States of Florida, New Mexico, Colorado, Oklahoma, the Republic of Mexico, the Republic of Columbia, and divers other places to the grand jurors unknown, Defendant

JAMIEL ALEXANDER CHAGRA
A/K/A JIM ALEXANDER

and other persons to the grand jurors known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to import marijuana, a Schedule I Controlled Substance, into the United States from the Republic of Columbia, contrary to Title 21, United States Code, Section 952(a), and in violation of Title 21, United States Code, Section 963; and to effect the objects of said conspiracy, the following overt acts were committed:

1. On or about July 28, 1977, Defendant JAMIEL ALEXANDER CHAGRA, a/k/a JIM ALEXANDER and Henry Wallace had a meeting in Berino, New Mexico.

2. On or about July–August, 1977, Henry Wallace and William Dudley Connell had a meeting in El Paso, Texas.

3. On or about September 17, 1977, Jim French and Henry Wallace purchased aircraft N6124X in Oklahoma City, Oklahoma, in the name of Richard Young.

4. On or about September 26, 1977, Henry Wallace departed El Paso, Texas, to meet Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER in Miami, Florida.

5. On or about September 27, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER and Henry Wallace obtained a false passport in the name of Robert Rosson.

6. On or about September 28, 1977, Henry Wallace left Miami, Florida, for the Republic of Columbia.

7. On or about October 18, 1977, Willian Dudley Connell in El Paso, Texas, had a telephone conversation with Henry Wallace.

8. On or about October 18, 1977, Willian Dudley Connel in El Paso, Texas, had a telephone conversation with Paul Taylor.

9. On or about October 19, 1977, Paul Taylor traveled

from Demver, Colorado, to El Paso, Texas.

10. On or about October 19, 1977, Paul Taylor obtained a passport in Juarez, Mexico.

11. On or about October 20, 1977, Paul Taylor departed El Paso, Texas, for the Republic of Columbia.

12. On or about October 21, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a/ JIM ALEXANDER and Jim French departed Miami, Florida, in aircraft N6124X and attempted to import a quantity of cocaine from the Republic ofColumbia.

13. On or about October 26, 1977, Paul Taylor departed the Republic of Columbia and returned to the United States.

14. On or about November 1, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a/ JIM ALEXANDER and Jim French imported a quantity of cocaine from the Republic of Columbia.

15. On or about November 26, 1977, William Dudley Connell and Paul Taylor departed El Paso, Texas, for Miami, Florida.

16. On or about November 26, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER delivered a quantity of cocaine to William Dudley Connell and Paul Taylor.

17. On or about November 28, 1977, William Dudley Connell arrived in El Paso, Texas, with a quantity of cocaine.

18. On or about December 4, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a/ JIM ALEXANDER had a telephone conversation with Paul Taylor.

19. On or about December 19, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER had a meeting in Broward County, Florida, to arrange the off-loading of ships containing marijuana.

20. On or about December 22, 1977, the ship from "Dona Petra" departed Camarones, Columbia, with a quantity of marijuana.

21. On or about January 3, 1978, Henry Wallace traveled to the island of Aruba.

22. On or about January 10, 1978, Henry Wallace traveled to Juarez, Mexico.

23. On or about March 20–24, 1978, Defendant JAMIEL ALEXANDER CHAGRA a/k/a/ JIM ALEXANDER caused a quantity of marijuana to be delivered in Davie, Florida.

COUNT TWO
[21 U.S.C. § 963]

That beginning on or before June 1, 1977, and continuing until on or about April 1, 1978, in the Western District of Texas, the States of Florida, New Mexico, Colorado, Oklahoma, the Republic of Mexico, the Republic of Columbia, and divers other places to the grand jurors unknown, Defendant

JAMIEL ALEXANDER CHAGRA
a/k/a/ JIM ALEXANDER

and other persons to the grand jurors known an unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to import cocaine, a Schedule II Narcotic Drug Controlled Substance, into the United States from the Republic of Colombia, contrary to Title 21, United States Code, Section 952(a), and in violation of Title 21, United States Code, Section 953.

To effect the objects and purposes of said conspiracy, overt acts one through eighteen in Count One of this Indictment are hereby incorporated by reference.

COUNT THREE
[21 U.S.C. § 841(a)(1) &
18 U.S.C. § 2]

1. That on or about November 28, 1977, in the Western District of Texas, William Dudley Connell (the said William Dudley Connell being named as a principal but not as a defendant therein) unlawfully and intentionally did possess with intent to distribute a quantity of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. That Defendant, JAMIEL ALEXANDER CHAGRA a/k/a/ JIM ALEXANDER, aided, abetted, counseled, induced and procured the commission of the offense alleged above in violation of United States Code, Section 2.

COUNT FOUR
[21 U.S.C. § 848]

That beginning on or about April 1, 1974, and continuously thereafter up to and including April 1, 1978, in the Western District of Texas, the States of Florida, New Mexico, Colorado, Oklahoma, Connecticut, Pennsylvania, the Republic of Mexico, the Republic of Colombia, and divers other places to the grand jurors unknown, Defendant

JAMIEL ALEXANDER CHAGRA
a/k/a/ JIM ALEXANDER

unlawfully, knowingly, and intentionally violated Sections 841, 846, 952, 963, Title 21, United States Code, as alleged in Counts One, Two and Three of this Indictment (said counts being incoporated herein by reference), and as follows:

1. On or about April 22, 1974, Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER caused approximately 1,000 pounds of marijuana to be delivered to Connecticut.

2. On or about the summer 1974, Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER distributed approximately two ounces of cocaine in El Paso, Texas.

3. On or about October 1974 Defendant JAMIEL ALEXANDER CHAGRA a/k/a/ JIM ALEXANDER caused approximately 2,000 pounds of marijuana to be delivered to Pittsburgh, Pennsylvania.

4. On or about December 30, 1976, Defendant JAMIEL ALEXANDER CHAGRA a/k/a/ JIM ALEXANDER caused approximately 17,000 pounds of marijuana to be delivered to Ardmore, Oklahoma.

5. On or about June 11, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a/ JIM ALEXANDER attempted to import a quantity of marijuana from the Republic of Colombia.

6. On or about October 21, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER attempted to import a quantity of cocaine from the Republic of Colombia.

7. On or about November 1, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER imported a quantity of cocaine from the Republic of Colombia.

8. On or about November 25, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER distributed a quantity of cocaine in Ft. Lauderdale, Florida.

9. On or about December 26, 1977, Defendant JAMIEL ALEXANDER CHAGRA a/k/a/ JIM ALEXANDER caused a quantity of marijuana to be imported into the United States from off the coast of Florida.

10. On or about February 1978, Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER delivered a quantity of cocaine in Ft. Lauderdale, Florida.
11. On or about March 26, 1978, Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER caused a quantity of marijuana to be delivered in Davie, Florida;

which violations were part of a continuing series of violations of the Controlled Substance Act, Title 21, United States Code, Section 801, et seq., and the Controlled Substances Import and Export Act, Title 21, United States Code, Section 951, et seq., undertaken by Defendant JAMIEL ALEXANDER CHAGRA a/k/a/ JIM ALEXANDER in concert with at least five other persons with respect to whom Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER, occupied a position of organizer, a supervisory position, and any other position of management, and from which such continuing series of violations Defendant JAMIEL ALEXANDER CHAGRA, a/k/a JIM ALEXANDER, obtained substantial income and resources, of which the United States seeks forfeiture, including all profits obtained by the Defendant JAMIEL ALEXANDER CHAGRA a/k/a JIM ALEXANDER in such continuing criminal enterprise, and of his interest in, claim against, and property and contractual right of any kind affording a source of influence over such enterprise, all in violation of Title 21, United States Code, Section 848.

APPENDIX F

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

United States of America

v.

INDICTMENT

CRIMINAL NO. 80-165-5

JAMIEL CHAGRA,
JACK STRICKLIN,
DOUGLAS BAXTER,
MICHAEL HALLIDAY,
MICHAEL S. OKIES,
TERRY JOHNSON,
WILLIAM RUSSELL,
KERMIT SCHWEIDEL,
LEE SPINKS,
DAVID KJOLNER,
MARK SNYDER,
JOHN MILLIORN,
DANIEL CACY,
JOSEPH WILLMENG,
THOMAS MARENGO
RICHARD SHAKITANO,
RALPH LNU, (described as a Mexican American male, black hair, dark complexion, app. 5'10" in his late twenties)
DANIEL SUSNJER,

LEE HUME,
STEVEN SPIELMAN and
GEORGE MICHAEL MALONE

The grand jury charges:

COUNT I

From on or about January 1, 1975, up to and including December 31, 1978, at Gloucester, Manchester and elsewhere in the District of Massachusetts, at Staten Island in the District of New York, at Las Vegas, in the District of Nevada, at El Paso in the District of Texas, at Atlanta in the District of Georgia, at Holt in the District of Michigan and Colombia, South America, and elsewhere

JAMIEL CHAGRA,
JACK STRICKLIN,
MICHAEL HALLIDAY,
MICHAEL S. OKIES,
TERRY JOHNSON,
WILLIAM RUSSELL,
KERMIT SCHWEIDEL
LEE SPINKS,
DAVID KJOLNER,
MARK SNYDER,
JOHN MILLIORN,
JOSEPH WILLMENG,
DANIEL CACY,
RALPH LNU (described as a Mexican American male, black hair, dark complexion, app. 5'10" in his late twenties),

DANIEL SUSNJER,
LEE HUME,
STEVEN SPIELMAN,
GEORGE MICHAEL
MALONE,

and other divers persons presently known and unknown to the Grand Jury, did knowingly, intentionally and unlawfully combine, conspire, confederate and agree to commit an offense against the United States, to wit, to knowingly and unlawfully import into the United States, from a place outside thereof, a quantity of marijuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 952, 960 and 963 and Title 18, United States Code, Section 2.

COUNT II

On or about July 22, 1975 up to and including July 25, 1974 at Gloucester, in the District of Massachusetts,

JAMIEL CHAGRA,
DOUGLAS BAXTER,
LEE SPINKS,
DAVID KJOLNER,
MARK SNYDER,
DANIEL CACY,
RALPH LNU (described as a
Mexican American male, black
hair, dark complexion, app.
5'10" in is late twenties),
STEVEN SPIELMAN,
and
DANIEL SUSNJER

and knowingly, unlawfully and intentionally import into the United States from a place outside thereof, a quantity of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Section 952 and 960.

COUNT III

From on or about January 1, 1975 up to and including December 31, 1975, at Gloucester, Manchester in the District of Massachusetts, at Staten Island in the District of New York, at Las Vegas in the District of Nevada, at El Paso in the District of Texas, at Atlanta in the District of Georgia, at Holt in the District of Michigan, and elsewhere

JAMIEL CHAGRA,
JACK STRICKLIN,
DOUGLAS BAXTER,
MICHAEL HALLIDAY,
MICHAEL S. OKIES,
TERRY JOHNSON,
WILLIAM RUSSELL,
KERMIT SCHWEIDEL,
LEE SPINKS
DAVID KJOLNER,
MARK SNYDER,
JOHN MILLIORN,
JOSEPH WILLMENG,
DANIEL CACY,
THOMAS MARENGO,
RICHARD SHAKITANO,
RALPH LNU (described as a Mexican American male, black hair, dark complexion, app. 5'10" in his late twenties),
DANIEL SUSNJER,
LEE HUME,
STEVEN SPIELMAN,
and
GEORGE MICHAEL MALONE

did knowingly and intentionally combine, conspire, confederate and agree with divers persons presently known and unknown to the Grand Jury to commit an offense against the United States to wit knowingly and intentionally distribute a quantity of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and846.

COUNT IV

On or about July 22, 1975, up to and including July 25, 1975, at Gloucester, in the District of Massachusetts,

JAMIEL CHAGRA,
JACK STRICKLIN,
DOUGLAS BAXTER,
MICHAEL HALLIDAY,
MICHAEL S. OKIES,
TERRY JOHNSON,
WILLIAM RUSSELL,
KERMIT SCHWEIDEL,
LEE SPINKS,
DAVID KJOLNER,
MARK SNYDER,
JOHN MILLIORN,
DANIEL CACY,
RALPH LNU (described as a Mexican American male, black hair, dark complexion, app. 5'10" in his late twenties),
DANIEL SUSNJER,
STEVEN SPIELMAN,
and
GEORGE MICHAEL MALONE

did knowingly, willfully and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

APPENDIX G

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 80-165-S

JAMIEL CHAGRA

STIPULATION

Now comes the United States of America by and through its attorneys Edward F. Harrington, United States Attorney for the District of Massachusetts and Martin D. Boudreau, Special Attorney and Judd J. Carhart, Assistant United States Attorney and the defendant JAMIEL CHAGRA by and through his attorney Oscar Goodman, Esquire, and hereby stipulates that the Government would adduce the following facts through the following witnesses at the trial of this matter:

1. Scott Emlong would testify as follows:

In approximately mid-March of 1975, Emlong met with Peter Krutschewski and Jamiel Chagra at the Coconut Grove Hotel, Miami, Florida for the purpose of working for Peter Krutschewski in an upcoming smuggling venture of marijuana

from Colombia, South America to Gloucester, Massachusetts. David Thomas also arrived in Florida at this time to participate in the forthcoming trip to Colombia to make contact for the acquisition of the marijuana. Emlong and Thomas were employees of Peter Krutschewski. Krutschewski and Chagra were partners in the proposed smuggling venture. Shortly before March 21, 1975, a meeting was held at the Coconut Grove Hotel among the above-named people and Steven Spielman who was going to be a partner with Chagra and Krutschewski.

On approximately March 21, 1975 Chagra, Krutschewski, Spielman, Emlong and Thomas flew via commercial airline from Miami, Florida to Colombia, South America. Upon arrival in South America, they all checked into a hotel. Emlong and Thomas were directed to stay in the hotel while Krutschewski, Chagra and Spielman attempted to make contact for the source of the marijuana. The attempts by Chagra, Krutschewski and Spielman to make contact with the source of the marijuana took place for the next several days.

On approximately March 25, 1975, Emlong and Thomas were directed by Krutschewski to return to the United States. Prior to their departure, they were directed by Chagra and Krutschewski to meet Douglas Baxter at The Jockey Club Hotel in Miami, Florida, so that Baxter could look at the boat Spielman proposed to use to import the marijuana into the United States. Emlong and Thomas checked into the Jockey Club and met with Baxter.

On approximately March 26, 1975 Chagra, Krutschewski and Spielman returned to Miami from Colombia, South America. All parties left the Jockey Club on approximately March 27, 1975. In April and May, 1975 two more trips were made to Colombia, South America by Chagra, Krutschewski and Thomas for the purpose of acquiring the marijuana to

import into the United States. In early June, 1975, Chagra, Krutschewski, Joseph Willmeng and Scott Emlong went to Colombia, South America, for the purpose of making a payment for the purchase of the marijuana. Approximately $250,000 was brought to South America for this purpose. While in South America, in addition to paying over the $250,000 for the marijuana, Chagra and Krutschewski met with the captain of the boat that was to tr nsport the marijuana, looked at the boat, and reviewed navigational charts of the waters off the coast of Massachusetts.

An individual by the name of Ralph (last name unknown) who worked for Chagra arrived in South America for the purpose of travelling on the boat with the marijuana from Colombia, South America to Massachusetts. Chagra, Krutschewski, Willmeng and Emlong returned to the United States. Shortly after his return to the United States, Scott Emlong travelled from Florida to Massachusetts at the direction of Krutschewski and with him two houses were rented to be used as off-load sites of the marijuana. In addition two houses were rented for employees of Chagra and his partner Jack Stricklin to live in while in Massachusetts offloading the marijuana. Chagra arrived in Massachusetts in approximately late June or early July, 1975.

Shortly thereafter Chagra and Krutschewski went to one of the off-load houses. Several off-load boats were thereafter purchased to ferry the marijuana from the Colombia ship to shore.

On an evening prior to the 22nd of July, 1975, a meeting was held on one of the off-load boats among Chagra, Krutschewski, Emlong, Thomas, Cacy, Spielman and a number of other individuals for the purpose of reviewing maps and charts of the waters, discussing each others areas of responsibility, discussing communication codes that would be used and navigational aides.

On the evening of July 22, 1975, the ship carrying 54,000 pounds of marijuana arrived off the coast of Gloucester from South America. For the next three nights, marijuana was taken off the Colombia ship on the off-load boats and brought to the off-load house at Folly Cove. During this time, Chagra participated in and supervised the offloading of the marijuana from the off-load boats onto the shore. He also participated in and supervised the offloading of the marijuana onto trucks to be driven away for the purpose of distribution.

2. David Thomas would testify concerning the above-mentioned trips to South America and activities in Massachusetts with respect to Jamiel Chagra. In addition, Thomas would testify that on or about August 19, 1975, at El Paso, Texas he picked up money in excess of $100,000 from Chagra which was then transported to Peter Krutschewski.

3. Daniel Cacy would testify that he participated in the offloading of marijuana from the Colombia ship and ferrying to shore at Folly Cove, Gloucester, Mass., that during his participation in this venture, he met Chagra, knew that Chagra was a partner of Peter Krutschewski in this venture and that Chagra and Stricklin supervised the individuals from Texas who worked on the off-load crews and were responsible for transporting the marijuana away from Gloucester, Mass.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 18 1981
ALEXANDER L. STEVAS

No. 81-726

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMIEL CHAGRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

D. LOWELL JENSEN
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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioner's indictment in the United States District Court for the District of Massachusetts for various marijuana offenses in view of his previous conviction in the United States District Court for the Western District of Texas for conducting a continuing criminal enterprise involving the importation and distribution of marijuana and cocaine.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-726

JAMIEL CHAGRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 653 F. 2d 26. The opinion of the district court continuing the two conspiracy counts and denying the motion to dismiss the indictment as to the two remaining counts (Pet. App. 1c-9c) is reported at 494 F. Supp. 908. The district court's subsequent decision to dismiss the indictment in its entirety (Pet. App. 5d-6d) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1981, and a petition for rehearing was denied on August 21, 1981 (Pet. App. B). The petition for a writ of certiorari was filed on October 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1979, petitioner was indicted in the United States District Court for the Western District of Texas on

one count of conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count I), one count of conspiracy to import cocaine, in violation of 21 U.S.C. 963 (Count II), one count of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count III), and one count of conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count IV) (Pet. App. 1e-7e). The continuing criminal enterprise charged in Count IV was alleged to have existed between April 1, 1974, and April 1, 1978 "in the Western District of Texas, the States of Florida, New Mexico, Colorado, Oklahoma, Connecticut, Pennsylvania, the Republic of Mexico, the Republic of Colombia, and divers other places to the grand jurors unknown * * *" (*id.* at 5e). With the exception of an allegation of a December 30, 1976, delivery of marijuana to Ardmore, Texas, all of the events charged in Count IV were alleged to have occurred in 1974, 1977 or 1978 (*id.* at 6e-7e).

Petitioner was convicted on Counts III and IV, sentenced to concurrent terms of 15 and 30 years' imprisonment and fined $125,000 (A. 23).[1] His appeal from those convictions is currently pending, No. 80-1377 (5th Cir., argued Oct. 14, 1981).

2. In May 1980, petitioner and 20 co-defendants were indicted in the United States District Court for the District of Massachusetts for offenses arising out of the importation of 54,000 pounds of marijuana at Gloucester, Massachusetts, in July 1975. Count I of the Massachusetts indictment charged petitioner and 17 co-defendants with conspiring to import marijuana during the period January 1, 1975, through December 31, 1975, in violation of 21 U.S.C. 952,

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[1] "A." refers to the appendix filed in the court of appeals.

960 and 963 and 18 U.S.C. 2 (Pet. App. 4a; A. 7-8).[2] Count II charged petitioner and eight co-defendants with the importation of marijuana, in violation of 21 U.S.C. 952 and 960. Count III charged all of the defendants with conspiring to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 846. Count IV charged petitioner and 16 co-defendants with possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Pet. App. 3f-6f).

Prior to trial, petitioner moved to dismiss the Massachusetts indictment on the ground that it violated his rights under the Double Jeopardy Clause. Specifically, petitioner contended that his prior conviction in the Western District of Texas for conducting a continuing criminal enterprise from April 1, 1974, through April 1, 1978, included the 1975 acts charged in the Massachusetts indictment.

The district court initially denied petitioner's motion with respect to Counts II and IV of the Massachusetts indictment (the substantive counts), and severed Counts I and III (the conspiracy counts), withholding action on them pending disposition of petitioner's appeal from his conviction in the Western District of Texas (Pet. App. 1c-9c). The court held (*id.* at 6c) that "prosecution of lesser included offenses is ordinarily barred by conviction of the greater offense where evidence of the lesser offenses would have been admissible as cumulative evidence in the trial of the greater offense, but was not in fact offered." However, because venue of the substantive offenses charged in Counts II and IV of the indictment, which allegedly were committed entirely in Massachusetts, would not have been proper in

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[2]The Massachusetts indictment is incorrectly reproduced in the appendix to the petition (Pet. App. 2f). Count I in fact alleged a conspiracy from January 1, 1975, up to and including December 31, 1975, not December 31, 1978.

Texas, the court concluded that those counts were not barred by petitioner's prior conviction (*id.* at 7c). By contrast, because the conspiracies charged in Counts I and III "were lesser included offenses which could have led to independent prosecution and punishment in the Western District of Texas," the court held that prosecution of those charges would be barred by the prior conviction (*id.* at 8c). In view of petitioner's pending appeal from the prior conviction, the district court noted (*ibid.*) that "[d]ismissal of Counts I and III of the indictment[] would be premature." Accordingly, the court severed those counts and continued them pending disposition of petitioner's appeal.

Following a bench trial on stipulated facts (Pet. App. 1g-4g), petitioner was convicted on Counts II and IV of the Massachusetts indictment. He was sentenced to consecutive terms of five years' imprisonment on Count II and two years' imprisonment on Count IV, the sentence on Count II to be served concurrently with petitioner's sentence on his Texas conviction and the sentence on Count IV to be served consecutively to his Texas sentence (*id.* at 5d).

The stipulated evidence showed that in March 1975 petitioner, Peter Krutschewski, and Steven Spielman entered into a partnership for the purpose of smuggling marijuana from Colombia, South America, to Gloucester, Massachusetts. Petitioner and Krutschewski hired a number of other people in order to carry out this venture. Several planning meetings were held in Colombia and Florida from March 1975 through June 1975. During that time, petitioner and Krutschewski made four trips to Colombia. On their last trip, they paid $250,000 for the marijuana. On the evening of July 22, 1975, a ship carrying 54,000 pounds of marijuana arrived off the coast of Gloucester from Colombia. The marijuana was unloaded and placed in trucks for distribution. Petitioner directly participated in and supervised this part of the operation (Pet. App. 1g-4g).

3. After petitioner's trial and sentencing, the district court reconsidered the motion to dismiss. On reconsideration, the court concluded (Pet. App. 6d) that "the issue of jurisdiction is not significant enough to justify a logical distinction between the substantive crime and the conspiracy charge with respect to the application of the bar of double jeopardy." Accordingly, the court vacated its judgment of conviction on Counts II and IV and, "[i]n order that this whole matter may be brought to the Court of Appeals for a determination" (*ibid.*), also vacated its prior order severing the conspiracy counts and withholding action on them. The court ordered that the indictment "be dismissed in its entirety" in order to "present this matter as expeditiously as possible for appeal to the Court of Appeals and resolution of the question of the effect of these Section 848 prosecutions" (*ibid.*).

4. The court of appeals reversed (Pet. App. 1a-16a). It held (*id.* at 14a; emphasis in original), *inter alia*, that the Massachusetts offenses were not lesser included offenses of the Texas continuing criminal enterprise offense "because proof of the Texas violation did not prove *any* of the facts necessary to show the Massachusetts violations, let alone *all* of them." Accordingly, the court of appeals ordered the Massachusetts indictment reinstated.

ARGUMENT

The decision of the court of appeals is correct, turns on the specific facts and circumstances of this case, and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court accordingly is not warranted.

1. The crucial factors in determining whether petitioner was being prosecuted twice for the same offense were the nature and purpose of the agreements and the structure and membership of the organizations, not the time period

involved. See *United States* v. *Papa*, 533 F. 2d 815 (2d Cir.), cert. denied, 429 U.S. 961 (1976). "Just as a defendant may be involved in more than one conspiracy over a period of time, he might also be the conductor of more than one continuing criminal enterprise." *United States* v. *Stricklin*, 591 F. 2d 1112, 1124 (5th Cir.), cert. denied, 444 U.S. 963 (1979). Petitioner's conviction for conducting a continuing criminal enterprise from April 1974 to April 1978 did not immunize him from all prosecutions for narcotics offenses that occurred during that time period no matter how separate and distinct. See *United States* v. *Papa, supra*, 533 F. 2d at 823.

Here, a comparison between the facts stipulated to in the Massachusetts trial and the allegations of the Texas indictment clearly shows that the Massachusetts transaction was not a part of the continuing criminal enterprise for which petitioner was convicted in the Texas case.[3] The evidence at the Massachusetts trial was that petitioner entered into a short term partnership with Krutschewski and Spielman, two men who were not alleged to have been involved in the Texas operation. This separate agreement was for the sole purpose of importing marijuana to Gloucester, Massachusetts, and involved 20 men in addition to petitioner, none of whom was alleged to have been involved in the Texas operation. The indictments and the stipulation of facts revealed no mutual dependence, cooperation, or any other

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[3]Relying on *United States* v. *Stricklin, supra*, petitioner contends (Pet. 22-25) that he was entitled to a remand in order to prove that the underlying facts in the Texas and Massachusetts prosecutions overlapped. *Stricklin*, however, held only (591 F. 2d at 1117-1119) that once a defendant makes a prima facie double jeopardy claim, the burden of proving that the indictments charge separate crimes shifts to the government. Here, the court of appeals expressly noted (Pet. App. 16a n.8), on the basis of the Texas indictment and the Massachusetts stipulation, that petitioner had not made out a prima facie case of possible double jeopardy.

connection between the Massachusetts and Texas operations. Cf. *United States* v. *Cambindo Valencia*, 609 F. 2d 603, 623 (2d Cir. 1979). The only factors common to the two schemes were petitioner's participation and one of the commodities involved—marijuana. Indeed, even petitioner's position within the two schemes was different. In the Texas enterprise, he was the "kingpin"—the man in charge—whereas in the Massachusetts operation petitioner had partners with whom he shared control and responsibility. The two indictments thus involved separate enterprises with different groups of entrepreneurs who happened, however, to be dealing in the same illicit commodity.[4]

2. Moreover, this is not a case in which the same evidence was offered to prove more than one offense. The facts stipulated to in the Massachusetts case did not even mention the Texas violations, nor did the government seek to establish the Massachusetts violations as part of its continuing criminal enterprise case in Texas.[5] Thus, the court of appeals correctly noted (Pet. App. 13a) that, in this situation,

> it is difficult to find interests underlying the "double jeopardy" clause with which double trials or punishments would significantly interfere. There is no possibility here of cumulatively punishing defendant for engaging in the same underlying activity. *United States* v. *Stricklin*, [*supra*,] 591 F. 2d at 1123. Neither the judge nor the jury in the Texas proceeding could have used Chagra's Massachusetts activity as a basis

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[4]The facts of this case are thus wholly distinguishable from the situation in *Jeffers* v. *United States*, 432 U.S. 137 (1977), in which "the identical agreement and transactions over the identical time period were involved in the two cases" (*id.* at 150 n.16).

[5]Both courts below found that only an insignificant, passing reference to the Massachusetts smuggling scheme was made during the Texas trial (Pet. App. 6a, 5d).

> for assessing his punishment, for they did not know about that activity. Chagra is not being required to relitigate any actual circumstances at issue in the first trial. He does not have to fear, or listen to, or prepare a defense for, the presentation of a single set of facts on more than one occasion. *Green* v. *United States*, 355 U.S. 184, 197, 78 S. Ct. 221, 223, 2 L.Ed. 2d 199 (1957). To try Chagra in Massachusetts violates no "finality" policy favoring the absolute inviolability of a jury acquittal[.] *Sanabria* v. *United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L.Ed. 2d 43 (1978). Since the facts presented in Massachusetts are totally different from those presented in Texas, there has been no opportunity for a jury to assess them favorably or unfavorably.

Accordingly, the Double Jeopardy Clause does not bar this prosecution, particularly under these circumstances, where petitioner could not have been properly charged in Texas on the substantive counts contained in the Massachusetts indictment. See U.S. Constitution, Sixth Amendment; Fed. R. Crim. P. 18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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